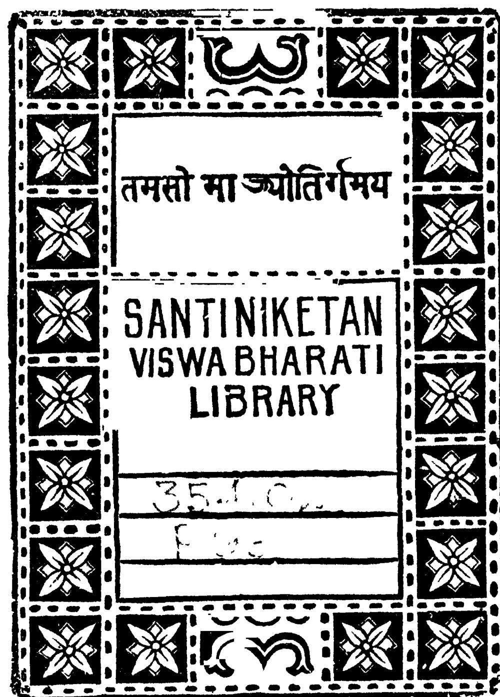

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# THE SEPARATION OF JUDICIAL AND EXECUTIVE FUNCTIONS IN BRITISH INDIA

COMPILATION OF AUTHORITATIVE OPINIONS AND STATEMENTS ON BOTH SIDES OF THE QUESTION (1783-1900) WITH NOTES OF SOME OF THE MOST FLAGRANT CASES ILLUSTRATIVE OF THE EVILS AND DANGERS OF THE UNION OF THE FUNCTIONS AND MR. PENNELL'S JUDGMENT ON THE CHAPRA CASE AND RESOLUTIONS OF THE INDIAN NATIONAL CONGRESS ON THE SUBJECT

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Compiled & Edited by

PRITHWIS CHANDRA RAY

AUTHOR OF
'THE POVERTY PROBLEM IN INDIA'
AND
'INDIAN FAMINES' ETC.


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CALCUTTA:

THE CITY BOOK SOCIETY,

*64, College Street.*

Calcutta :
PRINTED BY I C DAS, AT THE CHERRY PRESS,
8, COLLEGE SQUARE.

# INTRODUCTION

The present compilation on the subject of the Separation of the Judicial and Executive duties in India is made at the instance and expense of Lord Stanley of Alderley, whose sympathies with the Indian people are too well-known all over the country. Writing to a friend in Calcutta last summer, Lord Stanley said :—

*June 5, 1901.*

Dear Sir,

I enclose a cheque for £150. I should be glad if you would give, or cause to be given, one hundred Pounds of this to Constable Narsingh, as somewhat in compensation for the ill-usage he suffered at Chapra, and for his failure to obtain redress for it. Would you apply the remaining fifty pounds to publishing in a collected form the papers advocating the separation of the judicial and executive duties in India commencing with late Mr. Manomohan Ghose's pamphlets, including the memorial submitted to the Secretary of State by Lord Hobhouse and others ; also including a memorandum of Sir Richard Garth of 1893, and Mr. Romesh Dutt's scheme for the re-distribution of officials between the judicial and executive, and the later Resolutions passed by the National Congresses and Provincial Congresses.

You may publish this letter in the papers, as evidence of my sympathy with the people of India in their endeavours to obtain the separation of the judicial from the executive functions, the combination of which in the same officials deteriorates British administration in India, and vitiates the administration of justice in all the courts of Law.

Yours faithfully,
STANLEY OF ALDERLEY.

Lord Stanley's friend entrusted me with the work of collecting and editing the pamphlet and the result of my labours is embodied within the covers of this work. Excepting the Resolutions of the various Provincial Conferences which practically repeat those passed at the meetings of the Indian National Congress, all other papers referred to by Lord Stanley have been reprinted in this book. Besides these, I have also inserted in this compilation various other important opinions, state-

ments, and articles on both sides of the question which form, together with the late Mr. Monomohan Ghose's pamphlets and the Memorial to Lord George Hamilton printed in pp. 236—256, nearly a complete collection of all the available and responsible literature on the subject.

I have spared no trouble or labour in making this book an acceptable publication and worthy of the munificent gift of the noble donor. All that I need mention at this place is that the work of editing it has proved much more heavy than getting together the materials and seeing the following pages through the press : and in this connection, I acknowledge with thanks the very valuable aid I have received from my friends Messrs Romes Ch. Dutt and Bhupendranath Basu.

For a long time past in the history of Indian administration, far-sighted English statesmen have found the present system to be a dangerous anomaly. So early as 1861, Sir Bartle Frere hoped in introducing the Police Bill that "at no distant period the principle (of the separation of judicial and executive functions) would be acted upon throughout India." Forty years have elapsed since that hope was expressed in the Council Chamber of Government Place of Calcutta and yet those functions continue to remain united in the same officer in all parts of British India.

A succession of Viceroys and Secretaries of State for India have not so long thought proper either to interfere with the existing system or to wound the *amour propre* of the members of the heaven-born Service or to incur the expenditure necessary to carry out the proposed Separation. But there are times in the history of all governments when respect for traditions or the ideas of prestige and economy may be carried too far, and we only hope both in the interest of British statesmanship and of the people of India that a strong and right-thinking Viceroy as Lord Curzon will not allow anything to stand in the way of separating the functions under question and thereby confer the greatest boon to the people of this country that lies in His Excellency's gift.

Calcutta :
8, College Square,
*1st January, 1902.*

**Prithwis Chandra Ray**

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# BOOK I

# INTRODUCTORY NOTE

THE recent agitation in England and in this country on the subject of the separation of judicial from executive functions as regards the magistracy in India, has induced me to put together the opinions of eminent Anglo-Indian authorities, both for and against the continuance of the present system, from the earliest times. The present collection is by no means complete, but it contains all the opinions which I have been able to collect from various sources during many years. Some of them are taken from old files of newspapers, especially the *Hindoo Patriot*, and I have reason to believe in the accuracy of the texts given. They will be found useful at the present time, as there is no single publication which comprises the official opinions on the subject.

I have divided this compilation into three parts. In Part I will be found such opinions as I have been able to gather from the time of Lord Cornwallis (1793) down to the passing of the Police Act in 1860. Part II begins with an extract from a report of the Calcutta High Court, made in 1865, complaining of the fact that District Magistrates, by reason of their numerous executive duties, were prevented from doing much judicial work, and thereby fitting themselves for Judgeships, which they were in those days ultimately expected to fill. That report is followed by the opinions of some of the leading executive officers in Bengal, which it elicited. These opinions, though not directly bearing on the present question, are important as showing that in 1867-68, most of the executive officers then consulted freely acknowledged that the true solution of the problem consisted in *completely separating* the two branches of the service. That appears also to have been the opinion of the Judges of the Calcutta High Court in the time of Sir Barnes

Peacock, as well as Sir Richard Couch, as will be seen from subsequent reports in Part II.* In 1868 the Judges appear to have individually sent their opinions to the Governor-General in Council, and I regret that I have not been able to obtain copies of those opinions.

In January, 1868, the attention of the Secretary of State appears to have been drawn to the fact that "no sufficient distinction is maintained between the classes of officers called on to fulfil functions so widely different as those of the ordinary administrative branches of the judicial," but instead of directing the attention of the Government of India to the larger question of the separation of judicial from executive functions, the Secretary of State unfortunately limited the terms of his despatch to the comparatively narrow but important question of how to give the Civil Servants of the Crown the necesssry training for the judicial office, and to arrange "a system of promotion which would obviate the evils" which had been brought to his notice. This Despatch of the Secretary of State† elicited numerous opinions from several distinguished officials in India, many of whom chiefly directed their attention to the question of how to improve the efficiency of those called upon to perform judicial duties, and how to give them a better training for the judicial office. Though incidentally expressed, the opinion of so distinguished a jurist as Sir Henry (then Mr.) Maine, who after some years' experience of the Indian system, declared that in "Bengal Proper the interchanging of judicial and adminstrative functions is ruinous to the credit and efficiency of both branches of the service," is deserving of note.‡ Not less remarkable is the fact that so eminent a member of the executive branch of the Civil Service as Sir John Strachey then concurred with Mr. Maine.§ Along with other opinions in part III, elicited by the Despatch of the Secretary of State, I

* Extracts Nos. II and IV, part II, of this Book. Ed.

† Extract No. II, part III, of this Book. Ed.

‡ Extract No. XII, part III, of this Book. Ed.

§ Extract No. XII, part III, of this Book. Ed.

have thought fit to include, as it will be read with interest, the able minute recorded by so distinguished a Judge of the Calcutta High Court as Mr. Justice (now Sir William) Markby, although it is confined entirely to the question of the training our Judges should receive.* In this part will also be found the opinion of the then Lieutenant-Governor of Bengal, Sir W. Grey, and those of the officers whom he consulted on the two specific questions framed by the Government of India.† These opinions are valuable, inasmuch as some of the officers consulted give the true reason why they were opposed to a complete separation, or to the District Magistrate being deprived of his judicial powers, while such of them as were in favor of the reform, distinctly tell us that in their opinion, nearly 30 years ago, Bengal had so far advanced as to render a complete separation of the two functions desirable. I would particularly draw attention to the remarks of Mr. R. B. Chapman, Commissioner of the Nuddea Division, especially the opinion he expresses in paras. 27, 28 and 29 of his letter.‡

In all probability the reform advocated by so many eminent members of the Civil Service without any agitation or demand on behalf of the people themselves, would have long ago received the support of the Government of India, if a strong champion of the executive had not, in 1872, stepped in to oppose the measure as a part and parcel of that repressive and despotic policy with which his name will ever be associated in India. He was fascinated with the idea that personal rule and authority, which is another name for despotism, was necessarry to govern India, and as the power to punish was, in a barbarous state of society, the attribute of the Sovereign, so District Magistrates, who were the executive rulers of districts, should, in his opinion, continue to possess judicial powers! This opinion,§ it will be seen, was echoed by most

* Extract No. XIII in part III of this Book. Ed.

† Extract No. III in part III of this Book. Ed.

‡ Letter No. IX in part II of this Book. Ed.

§ Extract No. XV in part III of this Book. Ed

executive officers in India, and I fear still continues to prevail in influential quarters connected with the Government of this country.

It will be seen that this opinion of Sir James Stephen was not new. It had been put forward so far back as 1856 by Sir F. J. Halliday,* the then Lieutenant-Governor, who withdrew his own earlier and strongly expressed opinion of 1838,† but who was completely answered by his own successor, Sir John Peter Grant, a name still gratefully remembered in Bengal.‡

With full knowledge of Sir F. J. Halliday's views, the Police Commission of 1860 recommended :—"That as a rule there should be complete severance of executive police from judicial authorities," and this recommendation itself had been suggested by the Government of India, who in their instructions to the Commission took care to point out that "above all, the golden rule should be borne in mind, that police functions are not to be mixed up or confounded, and that the active work of preventing or detecting crime is to rest entirely with the police, and not to be interfered with by those who are to sit in judgment on the criminal."

As a matter of temporary convenience, however, and having regard to the then existing official agency, an exception was recommended by the Commission in the case of the District Magistrate, called the District Officer. The question now is whether the time has not arrived for discontinuing that exception, recommended and adopted as a temporary measure thirty-six years ago. Even then Sir Bartle Frere in the Legislative Council expressed a hope that, as the exception was based upon "prejudices of long standing," at no distant date the principle adopted by the Police Commission would be fully and completely carried out.

Several reasons have of late years been put forward for

* Extract No. VI, part I, of this Book. Ed.

† Extract No. II, part I, of this Book. Ed.

‡ Extract No. IX, part I, of this Book. Ed.

the retention of the exceptional position assigned to the District Magistrate in 1860. I will notice them *seriatim* :—

A.—It is alleged that the system works well.

B.—That any change in the present system involves considerable additional expense.

C.—That the District Magistrate cannot be deprived of his judicial powers without the loss of his prestige and influence over the people, and that such influence is necessary for the good gevernment of the country.

D.—That the District Magistrate "often acts as the connecting link between the Police and the Judiciary," and also "corrects the bias" which some Magistrates have "in favour of accused persons."

As regards the first of these heads, I can only say that if there are still any officials who think that the system works well, their opinion is opposed to that of the entire non-official community of all races in this country. The compilation of cases, which I publish separately,* ought to be a complete answer, and I would invite their attention to a very important expression of opinion, made so far back as 1868 by an eminent Civil Servant, Mr. F. R. Cockerell, once a member of the Governor-General's Council, which will be found in a postcript to his letter.†

As regards reason B, based on the ground of extra expense, it will be seen from some of the opinions now published, that many officers had, without any enquiry, all along assumed that in Bengal there were financial difficulties in the way of carrying out the proposed separation. But Mr. Romesh Chunder Dutt, C. I. E., at present Commissioner of the Orissa Division, has clearly shown by his Note of 1894, that the proposed reform could be easily carried out without any extra expenditure. His scheme, which I cordially approve of, is exceedingly simple, and cannot be objected to on any reason-

* Appendix A. of the present compilation. Ed.

† This letter will be found in part III (No. VII) of this Book. Ed.

able ground : Let all Magistrates of all classes who try cases be made subordinate to the appellate and revisional authority of only the District Judge, the District Magistrate continuing to be :—

"The head Executive Officer, the head Revenue Officer and the head Police Officer of his district.

He will collect revenue and taxes, and perform all the work connected with the revenue administration with the help of his assistants and deputies. He will continue to perform all executive work, and will be armed with necessary powers. He will watch and direct police investigations, and will be virtually the prosecutor in criminal cases. But he will cease to try or to have tried by his subordinates, criminal cases in respect of which he is the police officer and the prosecutor.

On the other hand, the District Judge will, in addition to his present duties, supervise the work of Joint Magistrates and Deputy Magistrates employed on purely judicial work. This work of supervision will be better and more impartially done by trained judicial officers than by over-worked executive officers, who are also virtually prosecutors. And the evil which arises from the combination of functions of the prosecutor and the Judge, of which we have had some striking illustrations of late, will cease to exist when the prosecutor is no longer the Judge."—*Note by Mr. R. C. Dutt, of the Bengal Civil Service.*

C. is after all the real objection, although it is generally to be found in confidential communications, and is not often openly put forward. In a debate in the House of Lords on the 8th May, 1893, the then Secretary of State for India, the Earl of Kimberley, contradicting Sir Richard Garth, late Chief Justice of Bengal, remarked :—

"I can in no way admit that the union of these two powers is maintained in India for the purpose of enhancing the prestige of officers of the Indian Government."

When Lord Kimberley was advised to contradict Sir Richard Garth and make the above remark, his Lordship could not possibly have read the opinions of officers like Lord Ulick Browne, Mr. H. Bell, and Mr. (now Sir) James Westland,* relied upon with approbation by the Government of Bengal. Lord Ulick Browne gave out the true view of the executive in India when he remarked :—

* All these opinions are to be found in part III of this Book (Nos. XI, X and VI respectively).

"In the event of so complete a change as that suggested, I think the District Officer's position and influence would be seriously affected. * * * *The District Officer need seldom use his judicial powers, but the knowledge he could do so, if he chose, would be everything.*"—(The italics are mine.)

Lord Kimberley will now find that Sir Richard Garth was perfectly right. It is not that the District Magistrate should use his judicial authority, for he has seldom the time to do so, but he should be able to hold it, like the sword of Damocles, in order to extort respect from the people, and also, I imagine, as occasion requires, large sums of money for public purposes! (See cases Nos. 9 and 17 of my Compilation of Cases.)

This is the true secret of the opposition, and let it be at once candidly acknowledged by those who are opposed to the reform. Lord Ulick Browne, Mr. Bell, and Sir J. Westland uttered the sentiments of a very large class of Indian Civil Servants, and this fact ought not to be concealed. I would ask those who honestly entertain the opinion officially put forward by Lord Ulick Browne in 1868, and endorsed by the Government of Bengal, to consider whether the following opinion, expressed in the same year by a distinguished member of the executive branch of the service, Mr. F. R. Cockerell, was not then strictly correct :—

"During the last ten years the procedure of our courts has vastly improved, and the administration of justice has been, and is still becoming, increasingly scientific. This is due no doubt in great measure to more complete legislation, but it is also due to the great progress which has taken place in the education of all but the lowest classes of the people during this period, and in the legal education of those persons who are employed in the conduct of suits in our courts, and who constitute the Mofussil Bar."

Have the people of Bengal made no progress whatever since 1868, and are "the lowest classes" quite so ignorant of their rights and so unfamiliar with the practice and procedure of our courts as they were then?

D.—This ground for supporting the present system is one which, so far as I know, has never been publicly put forward. I have only seen it in confidential communications, and I

venture to think that even those who have had the candour to put it forward confidentially would be ashamed to urge it or explain its real meaning *openly* and *publicly*. I therefore dismiss it, as it deserves to be, though I have good reasons to believe the ground is really one which several members of the executive branch of the Civil Service view with favor.

It will further be seen from the opinions I have collected, that the inconvenience of the system of which we still complain was felt by the High Court of Bengal even in the sixties, but the real point was missed, and a great deal of time and energy were spent in devising various means to minimise the evils of the system instead of striking at the root, namely, the possession by the District Magistrate of both executive and judicial authority. The union of these incompatible functions in the District Magistrate was always assumed as "essential" without any tangible and assignable reasons, and even now we are told by so high an authority as the present Lieutenant-Governor of Bengal* that "any proposal to change the position and responsibility of the District Officer would require the most serious consideration and the most careful examination before effect could be given to it in any part of India, even the most advanced. Over the greater part of India any change of the kind desired would be simply disastrous." I cannot speak of other parts of India, where it may be even necessary to proclaim martial law to maintain authority, but I speak with confidence of Bengal, of which I have some experience, and I say that if we are fit to have justice administered in Bengal according to that high ideal of impartiality and fairness which prevails in England, do not give us the shadow and take away the substance. If, on the other hand, the English model for which the people are clamouring is unsuited to the country, better abolish all Courts of Justice and revert to the old Oriental and patriarchal system, now completely forgotten

* Sir Alexander Mackenzie. Ed.

in Bengal, under which the king or the governor was also the dispenser of justice in all cases.

I venture to think that if there are reasons, besides those already noticed, which weigh with the Government, it is only fair that the public should be given an opportunity of meeting them, if it is in their power to do so.

We have been also told that "far too much is sought to be made of occasional errors of judgment or crudity of operation due to inexperience." It will be seen that very few of the 20 cases which I publish separately could be said to be due to "occasional errors of judgment or inexperience." The "crude operator," who, by exposing his operation to the public gaze, enables others to see the real character of his operation and its consequences, is in one sense a public benefactor as compared with the skilful and experienced operator who is able to deceive outsiders by his skill, and the mischievous results of whose operation therefore pass undetected.

If the reform we are now seeking had been quietly introduced in 1860, or even ten years later, it would have been welcomed, as will be seen from these opinions, by a considerable section of the executive branch of the Civil Service; but since then, popular bodies have sprung up in the country who, backed by a press not in favor with the official classes, have been persistently agitating for the complete separation of the two functions, and there is good reason to fear that at the present day, although many members of the judicial branch of the service still continue to be in favor of this reform, there may not be among the present body of executive Civil Servants, even half a dozen men who will not oppose this reform on vague and unassignable reasons of state policy declaring that the present union is either "the mainstay" or "the keystone" of British power in India, however disastrous it may be to the pure and efficient administration of justice. A strong Secretary of State or a strong Viceroy, who has the courage to disarm this opposition and to carry out this reform, will not only be removing a serious blot on the ad-

ministration of justice in India, but placing the real "mainstay" or the "keystone" of British administration on a much firmer basis than is generally imagined by those who are reluctant to part with their own power.

The present compilation of opinions does not extend beyond 1883. In the following year, during the Viceroyalty of Lord Ripon, the late Mr. Quinton collected for the Government a body of opinions in favor of the present system from executive officers in different parts of India, but these were treated as confidential.

During the present year the British Committee of the National Congress have collected several opinions in favour of the separation from several distinguished authorities on the subject. As these opinions, as well as Mr. R. C. Dutt's Note have been recently published in London, I have thought it unnecessary to include them in this compilation.*

17, THEATRE ROAD,<br>CALCUTTA ;<br>*15th July, 1896.*

**MANOMOHAN GHOSE.**

* In Book II of the present compilation all these opinions and notes have been inserted. Ed.

## PART I.

*Extract from section I of Regulation II of 1793 passed by the Governor-General in Council during the administration of Lord Cornwallis.*

"All questions between Government and the landholders respecting the assessment and collection of the public revenue, and disputed claims between the latter and their ryots, or other persons concerned in the collection of their rents, have hitherto been cognizable in the Courts of Maal Adawlut, or Revenue Courts. The Collectors of the Revenue preside in these Courts as Judges, and an appeal lies from their decision to the Board of Revenue, and from the decrees of that Board to the Governor-General in Council in the Department of Revenue. The proprietors can never consider the privileges which have been conferred upon them as secure, whilst the Revenue Officers are vested with these judicial powers. Exclusive of the objections arising to these Courts from their irregular, summary, and often *ex-parte* proceedings, and from the Collectors being obliged to suspend the exercise of their judicial functions whenever they interfere with their financial duties, it is obvious that, if the Regulations for assessing and collecting the public revenue are infringed, the revenue officers themselves must be the aggressors, and that individuals who have been wronged by them in one capacity can never hope to obtain redress from them in another. Their financial occupations equally disqualify them for administering the laws between the proprietors of land and their tenants. Other security, therefore, must be given to landed property and to the rights attached to it, before the desired improvements in agriculture can be expected to be effected. Government must divest itself of the power of infringing, in its executive capacity, the rights and privileges which, as exercising the legislative

authority, it has conferred on the landholders. The Revenue Officers must be deprived of their judicial powers. All financial claims of the public, when disputed under the Regulations, must be subjected to the cognizance of Courts of Judicature, superintended by Judges, who, from their official situations and the nature of their trusts, shall not only be wholly uninterested in the result of their decisions, but bound to decide impartially between the public and the proprietors of land, and also between the latter and their tenants. The Collectors of the Revenue must not only be divested of the power of deciding upon their own acts, but rendered amenable for them to the Courts of Judicature, and collect the public dues subject to a personal prosecution for every exaction exceeding the amount which they are authorised to demand on behalf of the public, and for every deviation from the Regulations prescribed for the collection of it. No power will then exist in the country by which the rights vested in the landholders by the Regulations can be infringed, or the value of landed property affected."

II.

*Extract from the Minute of Mr. (now Sir) F. J. Halliday, some time Lieutenant-Governor of Bengal and Member of the Council of the Secretary of State, dated 1838, when Mr. Halliday was a Member of a Committee appointed by the Government of Bengal to draw up a plan for the more efficient organisation of the Police.*

"6. The first and most prominent defect of our system I take to be the union of Executive with Judicial functions in the Magistrate. 'There is no more important principle in jurisprudence,' says a late writer on this subject, 'than the separation of the Judicial from the Executive ministerial functions.' The truth of the proposition is almost self-evident. If a law were to be made for uniting the duties of Judge and Sheriff, of Justice of the Peace and Constable, in the same individuals,

it would not only be found impracticable to perform them properly, but the very attempt would produce the most ridiculous confusion. Such a scheme would certainly be scouted as absurd, as well as mischievous. But many of our readers are not perhaps aware that, at this time, the functions of the Constable, or Executive Officer, are actually performed by the Police Magistrate, to a considerable extent. Much of the Magistrate's time is occupied in advising and directing the Police Officer in getting up evidence,—in shaping cases upon which the same Magistrate afterwards commits for trial, or summarily convicts. The Magistrate hears an *ex-parte* statement: upon that statement he issues his warrant, or summons to bring the offender before him. When the case comes on to be heard, there is perhaps not sufficient evidence to justify a committal, or bring the offence within some Act of Parliament. The prisoner is therefore remanded for further examination, with probably an observation from the bench, that a week in gaol will at all events do him no harm; and the Magistrate thereupon instructs the officers what evidence should be hunted up in the meantime. The Police Magistrates, however, do not seem to be always so successful in obtaining the testimony they desire, for prisoners are remanded not once only, but twice, thrice, and oftener. This practice, which subjects persons to the misery and contamination of a gaol before there is any evidence of their guilt, is much to be deprecated, but the gist of our present objection is to the interference of the Magistrate in getting up a case, in which he himself afterwards acts judicially, either by committing for trial, or summarily convicting. We hold that a Magistrate ought to have no previous knowledge of a matter with which he has to deal judicially; and that his functions ought not to exceed those constitutional duties which the existing law defines clearly enough, *viz.*, the conservation of the peace, by requiring sureties, according to the terms of the commission; the investigation of offences for trial, and committal of the offenders, the exercise of the power of summary jurisdiction under special

statutes, and that of the judicial function at quarter sessions. We therefore entirely concur in the opinion expressed by several intelligent Magistrates, that the whole executive duty of preventing and detecting crimes should be thrown upon the Metropolitan Police, and the Magistrates be confined strictly to the passive adjudication of the cases which the Police might bring before them. The catching the thief and getting up of evidence against him in the first instance might, in an improved state of the criminal law, be delegated to a particular department of the Police, in the same way as in a later stage of the proceedings it ought to belong to the office of public prosecutor."

7. These remarks were written for England, but they apply with double force to this country. In England a large majority of offenders are, as here, tried and sentenced by the Magistrates : but in the former country the cases so tried are comparatively of a trivial and unimportant nature. In India, the powers of the Magistrates are much greater ; their sentences extend to imprisonment for* three years, and their jurisdiction embraces offences which, both for frequency and importance, are by far the weightiest subjects of the criminal administration of the country.

8. The evil which this system produces is two-fold ; it affects the fair distribution of justice, and it impairs, at the same time, the efficiency of the Police.

9. The union of Magistrate with Collector has been stigmatized as incompatible, but the function of thief-catcher with judge is surely more anomalous in theory, and more mischievous in practice. So long as it lasts, the public confidence in our criminal tribunals must always be liable to injury, and the authority of justice itself must often be abused and misapplied. For this evil, which arises from a constant and unavoidable bias against all supposed offenders, the power of appeal is not a sufficient remedy :—the danger to justice, under such

* By Regulation II of 1834, Magistrates with full powers were authorised to award one year's imprisonment in lieu of corporal punishment.

circumstances, is not in a few cases, nor in any proportion of cases, but in every case. In all the Magistrate is Constable, Prosecutor, and Judge. If the appeal be necessary to secure justice in any case, it must be so in all: and if—as will follow—all sentences by a Magistrate should properly be revised by another authority, it would manifestly be for the public benefit that the appellate tribunal should decide all cases in the first instance.

10. It is well known, on the other hand, that the judicial labours of a Magistrate occupy nearly all his time; that which is devoted to matters strictly executive being only the short space daily employed in hearing thana reports. But the effectual management of even a small Police force, and the duties of a public prosecutor, ought to occupy the whole of one man's time, and the management of the Police of a large district must necessarily be inefficient which, from press of other duties, is slurred over in two hasty hours of each day.

11. I consider it then an indispensable preliminary to the improvement of our system, that "the duties of preventing crime and of apprehending and prosecuting offenders should, without delay, be separated from the judicial function, and for this essential improvement the amendments of the Report do not provide."

## III.

*Substance of the opinions expressed by Messrs. W. W. Bird and J. Lowis, Members of the Committee appointed by the Government of Bengal to draw up a plan for the more efficient organisation of the Police, which reported in 1838.*

Mr. W. W. Bird, the President of the Committee, dissented from Mr. Halliday's views as to the source from which the necessary funds should be obtained, but stated that he had no objection to the disunion of Executive from Judicial functions—a principle which, he stated, had been invariably advocated by him in both the Revenue and Judicial Departments, but

as it was at that time pertinaciously disregarded in the former it could not very consistently be introduced into the latter.

Mr. J. Lowis considered the measures proposed by Mr. Halliday to be "systematic in plan, complete in detail, and sound in principle," and gave the scheme his full support; and with reference to the argument used by Mr. Bird given above, thought it fallacious "to aver that a departure from right principle in one branch of administration requires, for the sake of consistency, a departure from it in another."

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## IV.

*Extract from a letter from Mr. C. Beadon, Secretary to the Government of Bengal, to the Government of India, dated 1854, para. 14.*

"The only separation of functions which is really desirable is that of the Executive and Judicial, the one being a check upon the other; and if the office of Magistrate and Collector be reconstituted on its former footing, I think it will have to be considered whether the powers of a Criminal Judge now vested in the Magistrate extending to three years' imprisonment with labour in irons might not be properly curtailed; whether the Magistrates should not be required to make over the greater portion of their judicial duties to qualified subordinates, devoting their own attention chiefly to Police matters and the general executive management of their districts."

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## V.

*Extract from the Minute recorded on the 23rd November, 1854, by the Hon'ble (afterwards Sir) J. P. Grant, when Member of the Governor-General's Council.*

"So far as that union combined the functions of a Civil and Criminal Judge, it was, I think, not merely unobjectionable in principle, but practically the best arrangement that could be made. In so far as it combined with the functions of a

Criminal Judge, the duty of a Superintendent of Police and Public Prosecutor, it was, I think, objectionable in principle; and the practical objections to it were greatly aggravated by the course of subsequent legislation, which raised the judicial powers of a Magistrate six times higher than they were in the days of Lord Cornwallis."

* * * *

"It ought to be the fixed intention of the Government to dissever as soon as possible the functions of Criminal Judge from those of thief-catcher and public prosecutor, now combined in the office of Magistrate. That seems to me to be indispensable as a step towards any great improvement in our criminal jurisprudence."

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## VI.

*Extract from the Minute of Mr. (now Sir) F. J. Halliday, Lieutenant-Governor of Bengal, dated 30th April, 1856, differing from the Hon'ble Mr. Grant's scheme for the separation of Judicial from Executive functions, and withdrawing his own previous opinion on the subject.*

"49. There is, however, an opinion which has found favor with some persons of just weight and authority in matters of this kind, and which has indeed a certain plausibility which tends to recommend it to many, and especially to those whose experience or whose mode of thinking has been derived from European rather than from Oriental habits, against which I am especially desirous of raising my testimony in this place—the rather, perhaps, that in the days of my smaller experience I myself have held and advocated the opinion, which I now very heartily condemn. The opinion to which I allude is this, that Magistrate of every degree should be debarred from all judicial powers, and should have nothing but the executive duty of preventing and detecting offences, and that separate judicial functionaries should always receive and try cases of every

kind committed to them by the Magistrates of various degrees. Thus it is I believe contemplated by some advocates of this system that at or near every place at which a Deputy Magistrate is stationed, there should be a Munsiff, a Sadr Amin, or a Judicial Officer of some corresponding class to try all cases sent to him by the Deputy Magistrate ; and that in the same way all cases coming before the Zillah Magistrate, whatever their nature and importance, should be sent for trial to a Judicial Officer at the zillah station, Native or European.

50. It is one very serious objection to this scheme, that it will be very expensive,—not unlikely, as I believe, to double the proposed additional charge. But I think this the smallest objection to which it is liable. It is a scheme foreign and unintelligible to Asiatic notions, and altogether founded on European ideas and habits, going indeed in its excessive provisions to a degree even beyond any general European practice.

51. I am very sure that our mofussil administration will *cœteris paribus* be generally efficient, while it is certain to be also acceptable to the people according to the degree in which it conforms to the simple or Oriental, in preference to the complex or European, model. The European idea of provincial government is by a minute division of functions and offices, and this is the system which we have introduced in our older territories. The Oriental idea is to unite all powers into one centre. The European may be able to comprehend and appreciate how and why he should go to one functionary for justice of one kind, and to another for justice of another kind. The Asiatic is confused and aggrieved by hearing that this tribunal can only redress a particular sort of injury, but that, if his complaint be of another nature, he must go to another authority, and to a third, or a fourth kind of judicature, if his case be in a manner incomprehensible to himself, distinguishable into some other kinds of wrong or injury. He is unable to understand why there should be more than one *hakim*, and why the *hakim*, to whom he goes, according to his own expression, as to a *father*, for justice, should be incapable of rendering

him justice, whatever be the nature of his grievance, or whatever be the position of his adversary.

52. Accordingly, not only in all our recent acquisitions, such as Scinde, the Punjab, Burmah, Nagpore, Oudh, but in most of these which date thirty and forty years further back, such as the Nerbuddah territories, Assam, or Arracan, we have carefully framed our administration upon the Oriental plan, modifying it only where absolutely necessary to ensure real benefit to the people. And while Europeanized methods of our oldest territories have been notoriously unsuccessful, the result has, on the whole, been so decidedly favourable in the newer districts, that no sound Indian statesman would now dream of proposing for any new acquisition any other plan of administration. Nothing can be more opposed to the Oriental plan of administration than the entire separation of Judicial from Executive duties, which is advocated by the overmuch occidentalists to whom I have alluded, at the same time that it is going backwards from the course which experience has been gradually forcing upon our older territories ever since 1793. In that year the 'regulation system' began by denuding Zillah Magistrates of almost all judicial powers. But this was soon found to be practically intolerable, and first in 1807, and afterwards at different intervals, the judicial powers of Zillah Magistrates were increased from infliction of one month's imprisonment to that of six months, one year, two years, and ultimately three years, which is the limit of judicial power now exercised by Zillah Magistrates. I know that the general opinion of the most trustworthy officers is that if the Magistrates were not so young,—that is, if by union of the office with that of the Collector, or in any other way, the age and experience of the Magistrates were raised to its former standard,—it would be wise to increase (instead of diminishing) their judicial powers, and to give them, as is given to Magistrates in several of the 'non-regulation' provinces, a power of sentencing to imprisonment for as many as seven years, subject only to the revision of a higher authority. This was recommended by Mr.

Dampier in his Police Report for 1848 for all cases of simple dacoity.

53. Before 1830, the trial of heinous cases in each zillah was by Circuit Judge, who came at stated intervals, tried such cases as he found ready, and departed, to be succeeded on the next circuit by a different, and again at another interval by a third, and sometimes even a fourth, Circuit Judge. Among some evils peculiar to the system as it then existed, there was undoubtedly much that operated with advantage in this successive circuits by successive Judges. That system has been succeeded by one in which each zillah station has its permanent Sessions Judge. And though this change effected an undoubted remedy for some of the more obvious evils of the previous system, it has been found in practice to be open to certain special objections, such as have been thought by many almost to counterbalance its admitted benefits. For instead of the little known, and therefore the more honored, Circuit Judge, we have now a Judge who, in a small station and a confined society, must of necessity be in such a degree of close and incessant intercourse with the Magistrate as usually breeds the familiarity which is proverbially destructive of respect. Small societies too are liable to jealousies, scandals, quarrels, over-friendship, over-enmities, and in all these, to the detriment of his official usefulness and his judicial dignity, the Judge is not seldom found to bear a part. Sometimes the Judge and the Magistrate are in open enmity, and then every counter-decision is apt to be attributed by their keen-sighted Native observers to the existence of ill-feeling between the two functionaries. As often, perhaps, the Judge and the Magistrate are in close intimacy, they dine together, they ride together, they shoot or hunt together, their tastes and feelings are obviously in unison; and then every judicial affirmation of commitments and appeals is liable by narrow-minded and interested bystanders to be put to the account of friendship and influence. In one zillah the Judge perhaps is weak, and exercises feebly and ineffectually the control over the Magistrate which the

system expects of him. In another zillah the Judge may be vigorous, encroaching, overbearing, and then the Magistrate is made a cypher, and his power, without his responsibility, passes into hands for which it was never intended. No one who is familiar with the state of the interior will deny that amidst much that is good, our present system is often marred by one or other or all of the evils I have above depicted; and these evils, wherever they occur, arise undoubtedly from the antagonism of the locally opposed judicial and executive authority. But conceive this local antagonism, not merely at each zillah station, but all over every district; and the antagonism in each case, not of two liberally educated Englishmen, but of two half-educated and orientally civilized Natives -and let those who know the country and people declare what would be the practical result. Conceive every Darogah opposed perhaps to an antagonist local Munsiff, and every Native Deputy Magistrate to a Native Sadr Amin at an out-station;—imagine the bickerings, the criminations, and recriminations that would ensue! For though under the greatest provocation corruption is the last thing which a Native ever imputes to an English Judge or Magistrate, it is the first imputation which a Native casts on a Native on great provocation, slight provocation, or no provocation at all. Thus, in but too many instances, would executive officers account for every failure by insinuations against the Judicial Department; and thus as often would the judicial functionaries retort by insinuations against the purity of the executive. At the best, all the difficulties and embarrassments, which even now not unfrequently impede the administration owing to divided authority at the chief zillah stations, would be multiplied a hundred-fold. If it were asked why crime had increased in a given district, the executive officers would reply—'Because of the pertinaciously unreasonabe acquittal of all our criminals by the judicial functionaries.' If the judicial functionaries were in any way questioned for this result, they would answer -'It is because of the negligence and inefficiency of the executive.'

Nobody would be responsible. Power would be everywhere divided, and everywhere contending against power. The administration of the interior would be torn asunder, and the result would be good made bad, bad made worse, and confusion everywhere worse confounded. No one who has the personal acquaintance with the interior, which my present position no less than my past experience has given me, can say that this anticipation is exaggerated. All must agree that the mischiefs I have anticipated would, under such a system, be very likely to break out.

54. I believe that to deprive our Magistrates of judicial power, while it would degrade them in the eyes of the Native community, who can never understand why when the *hakim* has caught a thief he should not forthwith try and punish him, would take away a great cause of self-respect from the executive functionary and a great means of self-improvement. I have no doubt that the sense of judicial responsibility has a very large and important effect in raising the character and improving the conscientiousness of our executive Magistrates, while it certainly adds greatly to their useful influence among the people ; and I am satisfied that justice is not likely to be less truly or satisfactorily administered under the present system which entrusts large judicial powers to Magistrates and Deputy Magistrates, than under a system, which, taking away from them all judicial power, should make them in their own view, and in the apprehension of the people among whom they act, nothing but a higher kind of Police Darogahs.

55. In recommending therefore a considerable addition to the number of Deputy Magistrates, I would be understood to advocate very strongly that they should, as at present, be permitted to exercise judicial powers, varying with their known qualifications and experience, and subject to revision by a higher authority. This is in perfect accordance with the recommendations of the recent Report of the Law Commissioners."

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## VII.

*Extract from a Despatch of the Court of Directors, of the East India Company, No. 41, Judicial Department, dated 24th September, 1856, on the subject of the re-organisation of the Police in India.*

"12. To remedy the evils of the existing system, the first step to be taken is, wherever the union at present exists, to separate the Police from the administration of the land revenue. No native officer should be trusted with double functions in this respect. We do not see the same objection to the combination of magisterial and fiscal functions in the hands of our European officers, because we can better hope they will not abuse their powers, and because by employing the Collector as the principal Magistrate of each district, we are able to obtain for the chief administration of the penal laws a more efficient and especially a more experienced class of officers than would otherwise be available. This is an important consideration which ought never to be lost sight of; nevertheless it is still more important that the officers who control the Police should be required to undertake frequent tours of their districts, and they must not be so burdened with other duties, such as the preparation of forms, returns and statements, as to be deprived of the time sufficient for this essential purpose. This supervision, exercised by intelligent officers, who are accessible at all times, is the most certain and effectual check to every abuse of authority by subordinate servants of Police.

"13. In the second place, the management of the Police of each district should be taken out of the hands of the Magistrate, who would thus have more time for the exercise of the double functions adverted to in the foregoing paragraph, and be committed to an European officer with no other duties, and responsible to a General Superintendent of Police for the whole Presidency."

## VIII.

*Extract from the Minute of Lord Canning, dated 18th February, 1857, concurring with the views of Mr. Halliday, Lieutenant-Governor of Bengal.*

"32. I agree generally with the Lieutenant-Governor in the remarks recorded by His Honour regarding the union of Judicial and Executive powers in the same hands. I conceive it to be quite in accordance with the notions entertained by the people of these provinces and well adapted to their state of civilisation that the officers who are charged with the duty of superintending and directing the operations of the Police should also exercise the powers of a Magistrate to try and punish offenders, except in heinous cases. In regard to the Magistrate of the district, I am of opinion that, although it is convenient that he should make over the immediate management of the Police to his head assistant—the Joint-Magistrate—and devote a greater portion of his attention to the trial of the heavier cases within his competence, and the preparation of cases which have eventually to be committed to the sessions for trial, it is most conducive to the public good that he should exercise a general control over the proceedings of his subordinate officer, and interfere when it may be necessary for him to do so. On the other hand, I see no reason why the Joint-Magistrate should not devote some portion of the time he can spare from Police duties to the disposal of judicial business. And with respect to the Deputy Magistrates in charge of subdivisions, though their attention should be primarily given to Police matters, it seems desirable that they should also exercise judicial authority in a large class of cases."

Mr. Dorin and General Low agreed generally in the Governor-General's proposals.

IX.

*Extract from the dissentient Minute of the Hon'ble J. P. Grant, Member of the Council of the Governor-General, and concurred in generally by Mr. Peacock, dated February, 1857.*

"42. *Union of the functions of Superintendent of Police with those of a Criminal Judge.*—This, as a question of criminal procedure, is so peculiarly a subject for discussion in this Council in its larger form, when reinforced by the learning and local experience of its Legislative Members, that it is not necessary for me to discuss it here. It will come up for discussion in connection with the new Codes. I will therefore here indicate my views upon it very shortly. The one point for decision, as it appears to me, on which alone the whole question turns, is this,—in which way is crime more certainly discovered, proved, and punished, and innocence more certainly protected —when two men are occupied, each as thief-catcher, prosecutor, and judge, or, when one of them is occupied as thief-catcher and prosecutor and the other as judge ? I have no doubt that the principle of the division of labour has all its general advantages, and an immense preponderance of special and peculiar advantages, when applied to this particular case ; and I have no doubt that if there is any real difference between India and Europe in relation to this question, the difference is all in favour of relieving the Judge in India from all connection with the Detective Officer and Prosecutor. The judicial ermine is, in my judgment, out of place in the bye-ways of the Detective Policeman in any country, and those bye-ways in India are unusually dirty.

"43. Indeed, so strongly does this feeling operate, perhaps unconsciously, upon the English minds of the honourable body of men from whom our Magistrates are chosen, that in practice the real evil of the combination is, not that a Judge, whose mind has been put out of balance by his antecedents in relation to the prisoner, tries that prisoner, but that the Superintendent of Police, whose nerve and honesty are indispensable to the

keeping of the native police officers* in order, abandons all real concern with the detection of crime, and the prosecution of criminals, in the mass of cases, and leaves this important and delicate duty almost wholly, in fact, to the native darogahs. He does this instinctively, because he knows that he will have to sit on these cases as judge ; and he feels that he cannot with satisfac tion to his own conscience, or even with outward decency, take an active share in both of his mutually repugnant duties.

"44. If the combination theory were acted upon in reality, if an officer, after bribing spies, endeavouring to corrupt accomplices, laying himself out to hear what every tell-tale has to say, and putting his wit to the utmost stretch, for weeks perhaps, in order to beat his adversary in the game of detection, were then to sit down gravely as a Judge, and were to profess to try dispassionately upon the evidence given in Court, the question of whether he or his adversary had won the game, I am well convinced that one or two cases of this sort would excite as much indignation as would save me the necessity of all argument *à priori* against the combination theory. The real question is not whether respectable European Superintendents of Detective Police shall also be high Criminal Judges, with powers to try all but the most heinous cases, but whether you will have any respectable European Superintendent at all effectively at the head of your Detective Police. The consequences of there being now no real check of the European superior over the Darogah in the detection of crime, and in the getting up of cases, are deplorable. The Lieutenant-Governor of Bengal appears to me to be less than just to our higher Criminal Courts in the blame he casts upon them. There seems to me to be something inconsistent, after the stress laid on the youth of the Magistrates, and the necessity of a change of system in order to substitute more experienced men, in supposing, when these youths and very much more experienced men differ, the youths to be generally in the right. It is the duty of Judges to acquit all prisoners whose guilt is not proved, and this duty they perform without

fear of man. That justice labours under heavy disadvantages in a country where in many cases no quantity of mere swearing will in itself carry conviction to a sensible mind, is manifest. If, after making due allowance for this advantage, it is found still that crime too frequently escapes punishment, surely the remedy is, not to complain of cool and disinterested men, who upon their judicial oaths aquit whenever they find no proof of guilt, but to apply ourselves to the root of the evil—by doing what we can to stimulate the active pursuit of offenders, and to check false prosecutions and, what is perhaps equally common, the getting up of false evidence against real criminals.

"45. The Lieutenant-Governor's objections to this division of business, after the best attention I can give them, seem to me to be founded on imaginary evils. His Honour anticipates such extreme antagonism between the Native Police Officer and the Native Judge as would be materially inconvenient. Under a moderately sensible European Magistrate, controlled by an intelligent Commissioner, who would not talk or act as if Police Peons and Darogahs were infallible and dispassionate Judges were never right, I cannot see why there should be any such consequences. At any rate, if this be a valid objection, it is an objection to giving criminal powers to any Munsiff; but this deduction is inconsistent with the views of the Lieutenant-Governor himself, who would not refuse *all* Munsiffs criminal powers."

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## X.

*Extract from the Instructions issued by the Government of India to the Police Commission of 1860, when forwarding a resolution of the Home Department, dated 17th August, 1860.*

"III. The functions of a Police are either protective and repressive or detective, to prevent crime and disorder, or to find out criminals and disturbers of the peace. These functions are in no respect judicial.

"This rule requires a complete severance of the Police from the Judicial authorities, whether those of higher grade or the inferior magistracy in their judicial capacity. When, as is often the case in India, various functions are often combined in the hands of one Magistrate, it may sometimes be difficult to observe this restriction ; but the rule should always be kept in sight that the official who collects and traces out the links in the chain of evidence in any case of importance, should never be the same as the Judicial Officer, whether of high or inferior grade, who is to sit in judgment on the case.

"This rule will prevent Police Officers from taking down confessions to be used subsequently as evidence—this being a judicial process of great importance.

"It ought, in fact, to prevent any Policeman from taking down in writing any deposition of a witness. The Police should be confined to catching the malefactors and procuring the attendance of witnesses, living it to a perfectly distinct agency to examine the witnesses and take down in writing their deposition.

"It may sometimes be difficult to insist on this rule, but experience shows it is not nearly so difficult as would be supposed, and the advantages of insisting on it cannot be overstated. It follows from this rule that Police Officers should never be habitually employed as assistants to the Magisterial Officers to try petty miscellaneous cases &c. The Police Officers may often with advantage try their own men, and they should always have power to do so ; but, though empowered, they should never be required to take up any other judicial duty. They should be left entirely free to devote their undivided attention to the discipline of their men, and to their proper police functions in detecting or preventing crime.

"IV. The organization of the Police must be centralized in the hands of the executive administration.

"The great problem of Police arrangements is how to reconcile this rule with the preceding one, that the Police

should be distinct from the Judicial agency; because, in all parts of India, but specially in what are called non-regulation provinces, the executive and judicial functions are united in the same hands in all public officers, from the lowest to a very high—often to the highest—grade.

"The working Police having its own officers exclusively engaged on their own duties in preventing or detecting crime, the question is, at what link in the chain of subordination between the highest and lowest officers in the executive administration is the Police to be attached, and so made responsible as well as subordinate to all above that link in the chain? The great object being to keep the judicial and Police functions quite distinct, the most perfect organization is, no doubt, when the Police is subordinate to none but that officer in the executive Government who is absolved from all judicial duty, or at least from all duty involving original jurisdiction, so that his judicial decisions can never be biassed by his duties as a Superintendent of Police. This was the case in Sind, and latterly in Bombay. It was the original plan for the Oudh Police, though latterly the link of subordination has been fixed lower in the scale, at the District instead of the Divisional Officer; and, so far, the existing organization in Oudh is less perfect than was intended, as a District Officer will now often have to decide cases judicially in getting up the evidence of which he has taken a very active personal part as Superintendent of the District Police. It is difficult to lay down any more definite rule as to the exact point where the subordination should commence than by saying that it should be so arranged that an officer should never be liable to try judicially important cases got up under his own directions as a Police Officer.

"No particular class or grade of officers can be named, because the same name often indicates different functions in different parts of India, and a variety of local circumstances often alters the relations of officers which would otherwise correspond, *e. g.*, the Deputy Commissioner of Oudh or the Punjab corresponds generally in position and functions with the Magis

trate of other parts of India ; but the Magistrate of one of the larger zillahs in Madras or Bombay has as large a charge as a Commissioner in the Punjab or Oudh ; one is as large, and several are half as large, as the whole Province of Oudh.

"In such large charges the change of the Magistrate having to try cases got up by himself are, of course, infinitely less than even in a Commissioner's charge in the Punjab or Oudh.

"For the decision, therefore, of this most important question, as to the precise link where the subordination and responsibility of the Police should commence, no one rule can be laid down. It must be decided in each province according to local circumstances. bearing in mind the great object that no man should be liable to try important cases judicially which have been got up under his own superintendence.

"This raises the question—Who is to be responsible for the peace of the district? Clearly that officer, whoever he may be, to whom the Police are immediately responsible. Under him, it is the duty of every Police Officer and of every Magisterial Officer, of whatever grade, in their several charges, to keep him informed of all matters affecting the public peace and the prevention and detection of crime. It is his duty to see that both classes of officers work together for this end ; as both are subordinate to him, he ought to be able to ensure their combined action.

"The exact limits of the several duties of the two classes of officers it may be difficult to define in any general rule ; but they will not be difficult to fix in practice if the leading principles are authoritatively laid down, and, above all, if the golden rule be borne in mind, that the judicial and police functions are not to be mixed up or confounded, that the active work of preventing or detecting crime is to rest entirely with the Police, and not to be interfered with by those who are to sit in judgment on the criminal."

## XI.

*Extract from the Report of the Police Commission of 1860, dated September, 1860.*

*The Police Commission was composed of the following:—*

*Mr. M. M. Court, C. S., N. W. P.*
*Mr. S. Wanchope, C. B., C. S., Bengal.*
*Mr. W. Robinson, C. S., Inspector-General, Police, Madras.*
*Mr. (now Sir), R. Temple, C. S., Punjab.*
*Lt.-Col. Bruce, C. B., Bombay Army, Chief of Police, Oudh.*
*Lt.-Col. Phayre, Commissioner of Pegu.*

"27. That as a rule there should be complete severance of executive police from judicial authorities; that the official who collects and traces out the links of evidence—in other words, virtually *prosecutes* the offender—should never be the same as the officer, whether of high or inferior grade, who is to sit in judgment on the case, even with a view to committal for trial before a higher tribunal. As the detection and prosecution of criminals properly devolve on the Police, no Police Officer should be permitted to have any judicial function.

"28. That the same true principle, that the Judge and Detective Officer should not be one and the same, applies to officials having by law judicial functions, and should, as far as possible, be carefully observed in practice. But, with the constitution of the official agency now existing in India, an exception must be made in favour of the *District Officer.* The Magistrates have long been in the eye of the law Executive Officers, having a general supervising authority in matters of Police, originally without extensive judicial powers. In some parts of India this original function of the Magistrate has not been widely departed from, in other parts extensive judicial powers have been superadded to their original and proper function. This circumstance has imported difficulties in regard to maintaining the leading principle enunciated above,

for it is impracticable to relieve the Magistrates of their judicial duties; and, on the other hand, it is at present inexpedient to deprive the Police and public of the valuable aid and supervision of the District Officer in the general management of Police matters.

"29. That, therefore, it is necessary that the District Officer shall be recognized as the principal controlling officer in the Police administration of his district, and that the civil constabulary, under its own officers, shall be responsible to him and under his orders for the Executive Police administration.

"30. That this departure from principle will be less objectionable in practice when the Executive Police, though bound to obey the Magistrate's orders *quoad* the criminal administration, is kept departmentally distinct and subordinate to its own officers, and constitutes a special agency having no judicial function. As the organization becomes perfected and the force effective for the performance of its detective duties, any necessity for the Magistrate to take personal action in any case judicially before him ought to cease.

"31. That the words 'District Officer' as used in these propositions, mean the chief magisterial officer in charge of a *district* and exercising the full powers of a Magistrate under the regulations; such as Magistrates of Bengal, and of the districts of the North-Western Provinces, and Deputy Commissioners of non-regulation provinces or by whatever other designation the officer in executive administration of a district is styled.

"32. That the District Officer is the lowest grade in whom Police and Judicial functions should unite; and that consequently all officers below that grade who are now invested with Police functions should not hereafter exercise those functions, beyond issuing such orders as may be necessary in their judicial capacity in specific cases before them.

"33. That the general responsibility for the well-being of the district should continue to be vested in the District

Officer as the chief conservator of the peace of the district, the Police being made an efficient instrument placed at his disposal for the protection of life and property, for the suppression of crime and the repression of local disturbances, and for the purpose of undertaking all the duties properly belonging to a constabulary."

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## XII.

*Extract from the report of a meeting of the Legislative Council of India held on Saturday, the 29th September, 1860.*

**Present :**

THE HON'BLE THE CHIEF JUSTICE SIR BARNES PEACOCK,
*Vice-President, in the chair.*

HON'BLE SIR H. B. E. FRERE.
HON'BLE C. BEADON.
H. B. HARINGTON, ESQ.
A. SCONCE, Esq.
HON'BLE SIR C. R. M. JACKSON, and
C. J. ERSKINE, ESQ.

Sir Bartle Frere, in moving the first reading of a Bill for the better regulation of Police, said :—It was necessary that he should offer a few brief remarks on the history of Police reform in India during the last quarter of a century. It would be in the recollection of Honorable Members of that Council, that up to a recent period, the Magistrate was charged with the oversight of the Police of his district, and this had been the practice for upwards of half-a-century. The consequence was that, as business increased, the Magistrate gradually became a Judicial Officer with very extended powers, and was little able to give his Police that exclusive attention which was absolutely requisite to keep it efficient. About the time of Lord William Bentinck, complaints of the inefficiency and corruption of the Police in all our Regulation Provinces became universal. The complaints were generally that, whether few or many

in proportion to the population, the Police was everywhere oppressive and corrupt, undisciplined and ill-supervised. The superior Officers and Magistrates were either inefficient Superintendents of Police, or if active as Police Officers, apt to be biassed as Magistrates. The earliest attempts at reform were made in the Presidency towns by appointing Superintendents of Police separate from the Magistrates, and it was observable that the result had been invariably such as to demonstrate the soundness of the principle of that separation. He thought that anybody coming to Calcutta, where the Police and Judicial duties of sitting Magistrates had long been separated, must be struck with the general efficiency of the Police. In Bombay great insecurity of life and property prevailed for some time, until Lord Clare, about 1832 or 1833, reformed the Police by appointing separate officers as Superintendents of Police, and separate sitting Magistrates to try cases that were brought up. This measure was coupled with the appointment of non-official Justices of the Peace, both native and European. These gentlemen had discharged the duties entrusted to them in a very satisfactory manner, and it had been found that the change had been attended with excellent results as regarded the administration of justice in Bombay, where a very general interest was taken in the matter by the non-official public. His Hon'ble and learned friend opposite (Sir Charles Jackson) would recollect numerous instances of the efficiency of the Police under Mr. Forjett, which was as high as could be expected of any Police in India. He (Sir Bartle Frere) would instance the suppression of the Bundergang, which have for some time entirely baffled the efforts of the Police. During the mutiny, Mr. Forjett was successful in maintaining public confidence in the Government throughout the native town in a manner which would serve as an example in any European country. He (Sir Bartle Frere) mentioned these instances in illustration of the value of one great feature of the measure which he was about to lay before the Council, that is, the entire separation of the

Executive Police from all immediate subordination to the sitting Magistrate and from all judicial functions.

The first real attempt to reform the Mofussil Police was made in Sind by Sir Charles Napier. Immediately after the conquest of that province, he drew up a plan, on the model of the Irish Constabulary, which, though complete from the first, was the result of long thought. Its characteristics were separate organization, complete severance of Police and Judicial functions, complete subordination to the general Government, and lastly, discipline, not in the nature of parade, but as far as was necessary to effective organization. His plan was adapted to the local village system as then prevailing in that province, and since its introduction nothing could have been more efficient than the Police. It was as first received with great distrust by the Civil Officers, a feeling in which he (Sir Bartle Frere) must say he at first shared, but its results were such as to convert the most sceptical among them. He might enumerate the total suppression of organized violent crime, the entire absence of dacoities or high-way robberies, and the check to the very prevalent crime of cattle-stealing, all which testified to the soundness of the principle of the measure. Nothing could have been better than the conduct of the Sind Police during the mutiny, and for that and the general efficiency of that Police, the thanks of the Government had repeatedly been conveyed to Major Marston, the Captain of Police, who had belonged to it since its first formation under Sir Charles Napier. The plan was approved by Lord Ellenborough, who was then Governor-General of India, and he ordered its extension to the North-Western Provinces. These Police Corps were raised to relieve the military of the Civil duties previously performed by them. Lord Ellenborough, however, left India, and there the reform stopped. Shortly after, Sir George Clerk, who came out as Governor of Bombay, visited Sind in 1847. He instantly recognized the value of the Sind Police, and commenced reforms on a similar principle in Bombay. He (Sir Bartle Frere) would refer to the great

value of Sir George Clerk's opinion, as affording an ample answer to the usual objection, that this system might do very well for England and Europeans, but was not adapted to this country. He believed there was no man living whose opinion was entitled to greater respect on such a question than Sir George Clerk, whether as regarded his intimate knowledge of the natives, or his sympathy with their wants and wishes, and his tact and discrimination in dealing with them. Shortly afterwards, the lamented Sir Henry Lawrence was appointed Chief Commissioner of the Punjab after the annexation of that Province, and he commenced upon the re-organization of the Police very much on the same plan adopted in Sind. Unfortunately, however, the original was departed from in many particulars, and a double system of Police created, namely, first, the employment of an unorganized body of Burkundauzes under the Deputy Commissioners as Magistrates, and secondly, the formation of Police Corps under the control of the Chief Commissioner, doing no real Police work, but exclusively employed as Jail and Treasure Guards, and on other duties which had previously devolved on the regular Army.

This system was effective, but very costly. The Police corps were in fact a second Civil Army. This was an objection to them as a Police, but it was very fortunane for India that the mistake—for it was a mistake as far as regarded their Police duties—was made, for it was these Corps which so materially assisted Sir John Lawrence to hold the Punjab and to retake Delhi. Still they were a very expensive addition, whether looked on in connection with the Police or the Army.

The Punjab Police was, he believed, the model for the Police Corps and levies which had grown up in the North-Western Provinces since 1857, and which now formed so serious a charge on the finances, and also for the Police Corps which existed in Oude before the mutiny.

He would now turn to Oude. The day after the fall of Lucknow, Sir James Outram, under instructions from the Governor-General, desired Colonel Bruce to submit a scheme

for Police, which he did on the Sind model on the 23rd March 1858. When Sir Robert Montgomery succeeded, we only held the capital, and the country had still to be subdued. He ordered Colonel Bruce to raise a Police to aid in the first instance in that object. In June 1858, three thousand Cavalry in five regiments and twelve thousand Infantry in fourteen regiments were ordered to be ready to take the field with Lord Clyde by the 1st October, 1858. This was done. They occupied the country as the army passed over it, were engaged in eighteen actions, and lost one European officer and thirty-seven men killed, one hundred and seventy-six men wounded, and one hundred and ninety-two horses, casualties. On the 1st January, 1859, Sir Robert Montgomery decided that the country having been thoroughly subdued, the Police should have a less Military character, and be made a purely Civil body on the principle of entire separation from the Military on the one hand, and from the Judiciary on the other. Within two months this was done. Colonel Abbott organized a Constabulary for Lucknow on the model of the London Police, and large numbers of Nujeebs and Burkundauzes were absorbed. The success of the measure was so great and tranquillity so complete, that on the 21st July, 1859, the Commissioners proposed a reduction of eleven lakhs per annum, the Theseel establishment being simultaneously reduced. The present Oude Police was about 9,200 men in number. Before the mutiny it was about 10,000 Police besides the Oude local force, three regiments of Cavalry, and ten regiments of Infantry. The annual cost of Nujeebs and Police under the King's Government, as taken from Parliamentary papers, was Rs. 45,61,000. After annexation the cost of the Police and local force was Rs. 26,98,000. The present Police expenditure was about Rs. 15,82,000. Meanwhile the Chief Commissioner contemplated further reduction, which it was hoped would bring it down to eleven lakhs of rupees per annum. The hearty thanks of India were due to Sir Robert Montgomery, Mr. Wingfield and Colonel Bruce for these results, which he begged the Council

to note as evidence of the mode in which such a Police could be adapted to the wants of any province, and as a very sufficient answer to the objections which had been raised both in this country and in England, to the large expenditure on the Police of the conquered province.

He would only briefly advert to what had been done in the way of Police reform in Madras, with which the Council were probably better acquainted than he was. Attention was first drawn to the subject by the Report of the Torture Commission, and the result was embodied in the Act passed by the Legislative Council on the 6th September, 1859. He might mention that he had often heard Mr. Robinson, the Chief of Police at Madras, speak of the obligation he was under to this Council and especially to the Honorable and learned Vice-President for the aid he received in framing this Act, which, although, it had not been in force for more than a year, had proved most successful in operation. The principle of that Act was well known to the Council, and he (Sir Bartle Frere) would therefore only read the following brief extract from the Report on the Administration of the Police, as constituted under that Act for the official year ending 30th April last :--

"The constitution of the Madras Police is as follows :—

I. A village or local Police consisting of, 1st. The Village Watch or local Police establishment constituted as at present, of the Talari or Village Watch and detective, but strengthened, improved, adequately remunerated and properly controlled. The Talari Police is strictly localized, and the limit of their duty duly circumscribed. They do the ordinary Police duty of the village and are kept in daily communication with each other and the general Constabulary through,— 2ndly. The Village Inspector, who is one of the principal and most intelligent ryots of the neighbourhood, and supervises the working of the Village Watchers within a circle of the villages conveniently clubbed together, and makes a daily report of all occurrences that take place to Head Constable of the District. The Village Inspector forms an important link in connecting the Police with the respectable rural population of the country.

II. General Stipendiary Constabulary—consisting of Inspectors of Police, Head and Deputy Constables and Privates. These latter are formed into Police parties of a strength adapted to the work to be performed, and are located under the command of Head and Deputy Constables at the headquarters of the Taluc Magistracy, and in other convenient positions for the patrol and watch of the

highways and country in general, every part of which is visited and communicated with once in twenty-four hours. District Inspectors of Police control and supervise the working of both the Village Police and the parties of the general Constabulary. They command them when collected for the performance of any duty ; and form, with the petty officers, the detective, and, so far as falls within the proper province of the Police, the Prosecuting Agency of each district. The lower grades of the general Constabulary are drawn from that class of the people who become peons and enter the native Army, and are of all castes and races. The Constables or petty officers will generally rise from the ranks. The Inspectors, the superior officers of the force (a fair proportion of whom will be Europeans and East Indians) are drawn from those superior classes of native society that enter the higher walks of the general service of the Government. They will intelligently guide and carefully watch the conduct and spirit of the ranks without being too intimately connected either in interest or sympathies with the bulk of the force.

That degree of Constabulary training and instruction which are indispensable to a body which has to guard Treasuries and Jails, and may be called upon to support the Magistracy in preserving the peace and ensuring order, is imparted to the force. They learn the use of their arms and the simple evolutions that may be required, but they carry no arms beyond the truncheon, the ordinary badge of office, except when occasion requires. The supply of arms to each district will be in a very limited proportion to the force employed. The means of rapid concentration are observed, and are greatly facilitated by the relation the Constabulary stands in to the Village Police.

No distinction is observed between preventive and detective duties. Every Police Officer, whether of the Village Police or general Constabulary, is responsible for every duty belonging to the Police. The smooth working of the Police is especially attended to, and, above all, they are enjoyed not to annoy the people by unnecessary interference. The Police is forbidden by the law to entertain petty complaints of every description, and even in cases of grave crime operates generally under a Magistrate's warrant only. Every grade of the Police is amenable to the jurisdiction of the Magistracy."

The Council would observe that this constitution struck at the root of one of the great curses of this country, namely, the detention by the Police of persons charged with offences, often without warrant and for corrupt purposes. Since the passing of the Act, eleven districts had been examined and reported upon by the Inspector-General. On the 25th of October, 1859, North Arcot was the first district brought under the operation of the Act. It had been extended to seven districts before the end of the official year. The area taken in hand

up to this date was nearly ten thousand square miles, and the number of the force organized was six thousand. Care had been taken to render the Village Police effective in every district simultaneously with the introduction of the regular Constabulary. No single case of jarring with the Magistracy had occurred. This was remarkable, as a transition state was full of anxiety, and nothing but great forbearance on both sides could have enabled it to be passed through in peace. He thought that what he had said on the subject of the Madras Police, would be satisfactory to the Council as tending to show that they had not been wrong in passing that Act.

In the North-Western Provinces, a great deal had been done preparatory to effecting a reduction of Police expenditure, and a reform of the Police. In November, 1858, two Commissions were appointed at Agra and Allahabad to consider and report on the Police of those provinces. In October, 1859, a comprehensive report was received from the Lieutenant-Governor on the subject, on which after much correspondence final instructions were given by the Governor-General in April last. The cost of the Military Police alone in the North-Western Provinces amounted to Rs. 44,61,000, from which the Lieutenant-Gevernor proposed to reduce thirteen and a quarter lakhs, the Civil Police to continue as a separate establishment costing about fifteen lakhs annually. The Military Police were employed to guard Jails and Treasuries, escort treasure and prisoners, and have a reserve force at headquarters. The entire proposed force of Military Police consisted of eighty-six European Officers, four thousand horse, and sixteen thousand foot, the cost of which was thirty-one and a half lakhs of rupees per annum. The Governor-General estimated that seven thousand foot and eighteen hundred horse would be sufficient at a cost of about eighteen lakhs per annum, and suggested an amalgamation of the Civil and Military Police on the Oudh system, so as still further to reduce the cost. In reply, the Lieutenant-Governor intimated his willingness to accept the Oude system with some modifications and appointed a

Committee at Nynee Tal to consider the subject, and report on it, and it was hoped that the result of their labours would be a very considerable reduction of expenditure under this head. So with regard to the Punjab, Sir Robert Montgomery was asked, in a letter from the Governor-General in April last, to consider the expediency of remodelling the Punjab Police on the Oude system, or, if that were impracticable, to reduce his Military Police to what was absolutely necessary for the internal peace of the country. It was calculated that seven thousand foot and sixteen hundred horse would suffice for these purposes, thus providing for an immediate reduction of 2,888 horse and 2,444 foot. The Lieutenant-Governor seemed inclined to adopt the Oude system. He did not anticipate that he would effect much reduction in the Police expenditure, but he hoped greatly to reduce the standing native Army of the Punjab.

The Government of India had thus done its part towards reducing the Police and semi-Military expenditure within proper bounds. It now rested with the local Governments to carry out these views, and from their well-known ability and energy, there was every hope of a satisfactory result.

In Bengal, Police Battalions were raised during the mutinies of 1857. The present strength was 6,600 privates at a cost of nine lakhs and sixty thousand rupees per annum, but the old Police and Station Guards had been abolished, and the total increase was less than seven lakhs per annum. It was the least expensive Police in India, but it was very desirable to render it more efficient, which could not be done without increased cost.

Thus it would be seen the necessity for economy had not been overlooked, but in order the better to secure that object and something like uniformity, the Police Commission was appointed on 17th August last, consisting of Mr. Court for the North-Western Provinces; Colonel Phayre for Pegu; Mr. Wauchope for Bengal; Mr. Robinson for Madras; Mr. Temple for the Punjub; and Colonel Bruce for Oude; all men.

of ripe experience, especially in matters connected with Police. They had submitted an able report which would be laid before the Council, together with this Bill which embodied the principles adopted in their report. The report was accompanied with documents which he thought would be found extremely interesting as regarded the cost of the Constabulary, which it was proposed to substitute for the present Police. The propositions of the Commission would be found stated in full in their report. He would only advert to the important ones; they were as follows:—

Complete separation of a Military armed force under Military command from the Civil Constabulary.

That the Military force should confine itself to Military duties and the Civil Constabulary to Civil duties.

That the Civil Constabulary for India should be formed on the model of the English and Irish Constabulary.

That Civil Constabulary should be under the Executive Government for all Police purposes, protective, preventive and detective.

That unity of action and organization were essential to efficiency and economy.

That all separate Police and quasi-Police bodies must, therefore, be absorbed in the new Constabulary.

That the same body should also provide for all purely Civil Police duties connected with the Army, such as watching military stores, &c., as distinguished from guarding them.

All personal Guards and Orderlies and Municipal Police to be incorporated in the new Constabulary.

That the new Constabulary be linked to the village Police, so as to make the latter an useful supplement to the former.

Mounted Police men to be employed only where absolutely necessary.

That there was to be no separate detective body, no spies and informers, who, under the present system, were a curse to the country.

That the Police Department should be a separate branch

of administration with an Inspector-General under each Government, the Police being linked on to the Magistracy at the District Officer or Chief Magistrate of the district, whatever might be his denomination.

The Inspector-General is to have under him Deputy Superintendents and other subordinates.

*Complete severance of Executive Police and Judicial functions.*—The paragraph on this subject ran thus :—

"That as a rule there shall be a complete severance of Executive Police from Judicial authorities, that the official who collects and traces out the links of evidence, in other words, virtually prosecutes the offender, should never be the same as the officer, whether of high or inferior grade, who is to sit in judgment on the case even with a view to committal for trial before a higher tribunal. As the detection and prosecution of criminals properly devolve on the Police, no Police Officer should be permitted to have any Judicial function."

The rest were details as to pay and organization. Among them it was provided that the pay of the Constabulary should be always equal to the highest wages of unskilled labour, that of Officers and Non-Commissioned Officers being such as to put them above temptation, and to form an inducement to respectable men to enter.

It was not to be expected that this plan would be accepted everywhere. Its progress must be gradual, as it had been in England and Ireland, where many years had elapsed before the system was extended over the whole kingdom. It was hardly to be expected that the measure would be carried out at once. It was essential that it should carrry with it the consent of the officers by whom it would be worked. It was not the intention of Government to put in force such a system until the officers to whom that duty would be entrusted were convinced of the soundness of the principle on which it was based. We had an encouraging proof of the mode in which those principles commended themselves to the judgment of practical men in the report of the Commission which was composed of officers of Government who had come from different parts of the country, and who had previously held the most discordant views. But after they had very fully

discussed the subject, they unanimously adopted the report which was the foundation of this Bill. The Commissioners would now return to their districts and would re-assemble here to determine the financial part of the scheme proposed by them. But wherever these officers went, he trusted, they would carry with them and disseminate the principles on which they had agreed, for he felt that they were not only calculated to maintain the public peace and security, but were also connected with the prosperity of the country, because unless the proposed scheme or some other equally efficacious in reducing the costs were adopted, there was no hope of bringing the income and expenditure of the Indian Government to meet within a reasonable period. It was to this point, he trusted, that the attention of the officers of Government would be directed. The subject of Police was one which had long attracted the attention of Mr. Wilson, and he believed that the plan of the Commission would have received his entire concurrence.

He must apologize to the Council for having detained them so long. He trusted the importance of the measure would plead his excuse. He should now move the first reading of the Bill. The Bill was read a first time.

## XIII.

*Extract from the report of a meeting of the Lagislative Council of India, held on Saturday, October 6th, 1860.*

### Present:

THE HON'BLE THE CHIEF JUSTICE, *Vice-President, in the Chair.*

HIS EXCELLENCY THE COMMANDER-IN-CHIEF.

HON'BLE SIR H. B. E. FRERE.

HON'BLE C. BEADON.

H. B. HARINGTON, ESQ.

A. SCONCE, ESQ., and

C. J. ERSKINE, ESQ.

Sir Bartle Frere moved the second reading of the Bill

"for the regulation of Police within any parts of the British Territories in India to which it may please the Governor-General in Council to extend its provisions."

Mr. Harington said, had it not been the intention to prorogue the Council to-day for some weeks, he thought he should have ventured to ask the Hon'ble Member of Council, who had charge of this Bill, to allow his motion for the second reading to stand over for a week at least, in order that before affirming the principle of the Bill by allowing it to be read a second time, they might have had a little more time for considering the provisions of the Bill, and for making themselves acquainted with the reasons of the measure which, they were informed, would be found very fully stated in the Report of the Police Commission, and in the Resolution of Government appointing that Commission. These important papers had not yet been officially communicated to the Council.

Sir Bartle Frere here mentioned that the papers had been presented.

Mr. Harington remarked that the papers had not yet been printed and circulated, and, he thought, that they ought to have been placed in the hands of Hon'ble Members in order that they might have had an opportunity of informing themselves of their contents before being called upon to vote on the motion before the Council. He need scarcely say that this Bill was a very important one ; few more important Bills had ever come before the Council. The changes which the Bill proposed to make in the system of the Mofussil Police were very large, and would affect not only the character of the Police as a body, but also their duties, powers, and responsibilities. He was sure that the Council would agree with him that changes so vast and extensive as were proposed by this Bill should not be hastily introduced ; in other words, that they should be adopted only after full enquiry into and ascertainment of what was defective in the existing system, and after careful and mature deliberation, and it appeared to him that this was especially necessary in the present case,

because he had reason to know that many old and experienced officers who differed materially on other matters, and some of whom preferred the non Regulation to the Regulation system, entertained very serious doubts whether the principles on which this Bill was stated to be based, however suited to England and Ireland and the three Indian Presidency Towns, were suited to the Mofussil Districts of this country. He was fully sensible of the great importance of having the Bill published at once for general information, in order that, when they resumed their sittings, they might have before them the opinions of the Local Governments and of their subordinate officers and of the public at large upon the various provisions of the Bill, and he for one should deeply regret if the publication of the Bill were delayed for weeks simply by reason of the sittings of the Council being suspended. Under these circumstances, although he must confess that the motion for the second reading of the Bill to-day, before they had been placed in possession of the materials on which the Bill was founded, had rather taken him by surprise, he considered it quite consistent with his duty that he should support the motion, but he did so on the understanding that he did not pledge himself to the details of the Bill, or, indeed, the principles involved in it.

Mr. Sconce said this was not a new Bill. It was an old friend with a new face. The Council would recollect, that just before the adjournment of the Council last year, we were pressed to pass the Madras Police Act; and though, he believed, he might say the Council entertained objections to pass a Bill of that kind as a general law, and some Members possibly thought the details of the Bill might be improved, nevertheless, under the urgency of the time, and circusmtances, the law, as submitted by the Madras Government, was adopted. Several Hon'ble Members of the Council, he believed, were of opinion that a change in the Police Administration, which was applicable to Madras, might not be inapplicable to the whole of India. Indeed, we looked upon the Madras Bill

in connection with the Code of Criminal Procedure, which was at that time passing through a Committee of the whole Council, and, if he rightly recollected, the Council were prepared to embody in that Code such portions of the law enacted for Madras as should appear to be an improvement upon the system now in force elsewhere. Now as to the Bill before the Council, he desired to remark that so many different topics were mixed up in it, that the more immediate object of its enactment appeared to be obscured. He was not substantially opposed to the principle advocated by the Hon'ble Mover of the Bill, which he took to be the re-organization of the Police; but the provisions embodied in the Bill were various and heterogeneous. First, it provided for the constitution of the Police; another point related to organization and government of the Police; another to procedure; and another applied to subjects which were embraced and better provided for in the Penal Code now about to be passed into law by the Council. For example, the 19th Section of this Bill related to the unlawful assumption of Police functions, the personation of Police, &c. Now he would ask the Council to refer to the Penal Code where there were better provisions for the punishment of cheating by personation. There was another Section of this Bill (Section XXII) relating to false or frivolous charges. He need not tell the Council that in the Penal Code there were provisions against making false charges. It appeared to him, therefore, that, while the Penal Code embodied the general law upon such points, it was inexpedient to introduce the same matter in a Police Bill. Again Section XXXIV of this Bill declared a penalty for any party failing to obey a summons, an offence which was fully provided for in Section 174 of the Penal Code. Then there was another Section (XLIV) relating to prevarication by Police Officers in judicial trials. If we did not legislate for prevarication with respect to witnesses in general, as certainly we did not in the Code, he did not see why we should do so as regards the Police in this Bill. There were other instances which he might

mention to the same end, and in the same manner, he might refer to other points which more properly came under the Code of Criminal Procedure. He did not know if the Hon'ble Mover of the Bill had gone through that Code which had received so much attention in a Committee of the whole Council this time last year. He (Mr. Sconce) could not, however, but express his strong conviction that whatever chapter of the Code we might chance to take up, contained in every way more satisfactory provisions than those laid down in this Bill.

He would not detain the Council unnecessarily long, but he might be allowed to say that all that had been done of late years to improve the Bengal Police had, in a measure, been ignored. He need not tell the Hon'ble and learned Vice-President that in the course of the years 1857-58, very large charges had been incurred by the Government of India for improving the Bengal Executive Police. On the whole, taking the additional cost of Mohurrirs, Jemadars, Burkundazes, Darogahs and Deputy Magistrates, no less a sum than about Rs. 7,69,000 was sanctioned by the Government in those two years. At the same time the total charge in the Regulation and non-Regulation Provinces of Bengal, exclusive of Deputy Magistrates, was about Rs. 13,30,000. His object in mentioning this was two-fold; first, we might reasonably expect to know what had been the result of those additional charges; and next, a more important question even than that was to ask, if the Civil Police charges now amounted to 13½ lakhs, how far it was proposed to go under the new Bill? The Commission to whom the question was referred, and by whom this Bill had been drawn, had declined, and were indeed at the moment unable, to estimate the cost of the change which they recommended. But this scheme was prepared after the system lately introduced into Madras, and from the papers that had been printed, he found that the new Police was estimated at the rate of one man to every thousand of the population. Thus it was calculated that 22,000 men to be entertained at Madras would cost 24 lakhs of rupees, or with necessary extra

charges, in all 30½ lakhs. If the same estimate were adopted here, the cost of 40,000 men, which at the same rate should be required for a population of 40 millions, would amount to 57 lakhs of rupees. It would appear then, from the only data yet furnished as to the working of the new system, that, as regards Bengal, a Police expenditure, which at present amounted to 13½ lakhs, might be increased to 57 lakhs. What he entirely agreed in with the Hon'ble Mover of the Bill was that there should be a thorough re-organization of the Police Establishment, which should secure the combined action of the whole body. At present, the Police of every district, indeed of every thannah, was unconnected, isolated and independent; and certainly it would be a great improvement to combine the whole into one working body under a common head. He would remind the Council, however, that organization was quite a different matter from Procedure, and this Bill adopted both. He heartily approved of the organization provided by the Bill. The further it was carried, the more thoroughly did he concur in the Bill, but he objected to the substantive Penal Law and Criminal Procedure being embodied in a Bill required for the reconstitution of the Police Establishment.

Another matter proposed by the Hon'ble Mover was that the Executive functions of the Police should be separated from their Judicial functions. That was a most important matter. For himself, speaking of the general principle only, he was disposed to adhere to the rule which should deprive Magistrates of the duties of Police Officers, but how far it was practicable was another question, and he must say that that was not the recommendation of the Commission, nor was it their intention that the connection of Magistrates with the Police should be discontinued. He was not speaking against the principle, but only against the supposition that by this Bill the object would be accomplished, and he could have no difficulty in satisfying the Council that the report did not go to this extent. The Commission drew up their recommendations

in a series of propositions. The 25th proposition was as follows:—

"That in every district under the jurisdiction of one Magistrate, there should be at least one European Officer of Police to be styled 'District Superintendent of Police,' who should be departmentally subordinate to the Inspector-General of Police in every matter relating to interior economy and good management of the force, and efficient performance of every Police duty ; but bound also to obey the orders of the District Officer (that is, the Magistrate) in all matters relating to the prevention and detection of crime, the preservation of the peace, and other Executive Police duties, and responsible to him likewise for the efficiency with which the Police performs its duty."

Here then it was clear that in the opinion of the Commissioners, the Magistrate should have full cognizance and control of the proceedings of the Police.

Again it was said—

"In some parts of India this original function of the Magistrate has not been widely departed from, in other parts extensive judicial powers have been superadded to their original and proper functions. This circumstance has imported difficulties in regard to maintaining the leading principle enunciated above ; for it is impracticable to relieve the Magistrates of their judicial duties, and on the other hand it is at present inexpedient to deprive the Police and the public of the valuable aid and supervision of the District Officer in the general management of Police matters. That, therefore, it is necessary that the District Officer shall be recognised as the principal controlling officer in the Police administration of his District. And that the Civil Constabulary, under its own officers, shall be responsible to him and under his orders, for the Executive Police administration."

Again it was said—

"That all Members of the Police force should be bound to obey the lawful orders of the Magistrate, and that for neglect of duty or disobedience of orders the Magistrate should have the power of inflicting summary criminal penalties ; such sentence to be appealable in the usual course of law."

It appeared also that a Despatch dated so lately as the 6th July last had been received from the Secretary of State on this subject, in which it was enjoined that the Civil Police should be under the control of the Magistrates of districts subject to the supervision of the Commissioner of the Division where such officer existed. And what did the Police Commission say ? They said:—

"We trust that our propositions will show the care we have taken to preserve

the responsibility of the Magistrate for the general success of the Criminal administration of the District, and to afford him prompt means of ensuring the obedience of the organized Constabulary to his lawful orders."

The Council, he thought, must now be satisfied as to the intentions of the Members of the Commission in preparing this Bill, who certainly did not propose to give effect to the principle of practically separating the duties of the Executive Police from those of Magistrates. The Commissioners admit the practical difficulties that presented themselves in dealing with the question, and the measure before them was not by any means of so thorough a character. The Bill, indeed, was silent on various important points of practice, and therefore did not carry out the principal object which it has been suggested to us was to be enforced. While we were considering the Criminal Procedure Code last year, one of the points discussed was the mode in which the police should exercise their functions, that is, as to the power of examining prisoners, taking confessions, questioning witnesses, and so on. On that point this Bill was wholly silent, and that he thought was a material defect of the Bill. It was not only a defect, but something more, because the Bill allowed functions to be exercised without defining the mode in which they were to be exercised. In this respect he very much agreed with the recommendations of the Commission. In their 69th proposition, it was stated as follows:—

"That the Police should not be used as an agency for the record of any evidence, confession, inquest or the like; but a system of keeping faithful, accurate and minute diaries should be maintained. These diaries should specify concisely, but in detail, all duties in which any Police Officer may have been engaged and every occurrence and information that may have required the attention of the Police within their respective ranges. All Police Officers, engaged in specific detective duties, should keep an accurate and minute diary of every step taken and every information obtained in following up the clue of evidence. Such diaries should be Police documents only, and be sent to the District Superintendents, but should be open to the inspection of the District Officer."

Now he need hardly tell the Council that not dissimilar propositions were contained in the Criminal Procedure Code, as it now stood. It prohibited the taking of evidence in detail. It

prohibited the record of confessions, and it declared expressly the use which should be made of the information obtained by the Police.

Substantially there was no difference between the rules of the Code of Procedure and the views of the Commissioners, but the enquiries of the Police would not be regulated by this Bill, by such arbitrary bye-laws as might be from time to time framed. He had already referred to the power to be exercised by Magistrates. He would read what the 67th proposition stated. It was as follows :—

"That the Police should send to the Magistrate all such reports as he may require regarding Crime and Criminal administration. But the Magistrate ought not to require more reports, &c., than are absolutely necessary."

If the Magistrate was to be allowed to call for any report he pleased, he (Mr. Sconce) thought that such a power was inconsistent with the declaration that the principle of the Bill was that the Magistrate should not interfere with the Executive Police functions. He thought that there was a great deal to be said on both sides. He would repeat that he rather inclined to the separation of Executive from Judicial functions, and he might adopt the clear and exact description of Executive duties recorded on the 30th April, 1857, by the Hon'ble and learned Vice-President as a Member of the Government. It was not therefore that he objected by any means to the separation of the two functions, but at the same time he felt, as the Commissioners seemed to feel, that much difficulty would be experienced in bringing the change into practical and consistent operation. Many officers entertained great doubt as to so entire a change, and the better plan, he thought, was to adopt some middle course as suggested by the Commissioners. He might refer to the authority of the late Lieutenant-Governor of Bengal. In his well-known Police Minute, Sir Frederick Halliday expressed a totally different opinion from the asserted principle of this Bill. In the 49th paragraph of his Minute, Sir Frederick Halliday observed as follows :—

"There is, however, an opinion which has found favor with some persons of just weight and authority in matters of this kind, and which has indeed a certain

plausibility which tends to recommend it to many, and especially to those whose experience or whose mode of thinking has been derived from European rather than from oriental habits, against which I am especially desirous of raising my testimony in this place, the rather perhaps in the days of my smaller experience I myself have held and advocated the opinion which I now very heartily condemn. The opinion to which I allude is this, that Magistrates of every degree should be debarred from all judicial powers, and should have nothing but the executive duty of preventing and detecting offences, and that separate judicial functionaries should always receive and try cases of every kind committed to them by the Magistrates of various degrees. Thus it is, I believe, contemplated by some advocates of this system that at or near every place at which a Deputy Magistrate is stationed there should be a Moonsiff or a Sadar Amin or a Judicial Officer of some corresponding class to try all cases sent to him by the Deputy Magistrate, and that in the same way all cases coming before the Zillah Magistrate, whatever their nature and importance, should be sent for trial to a Judicial Officer at the Zillah Station, native or European."

He would not detain the Council by reading at greater length the views recorded on this point by the late Lieutenant-Governor of Bengal, but he thought it important to refer to the opinion expressed by a person of so great authority and experience as Sir Frederick Halliday, as some ground for hesitating to prematurely adopt the principle which by this Bill we have been asked to sanction. Upon the whole, therefore, he would not oppose the second reading of the Bill. He accepted the second reading, but under great doubts as to the course to be followed. He felt that everything which trenched on the Penal Code and the Code of Criminal Procedure should be omitted. He heartily approved of it so far as it proposed to re-organize and reform the constitution of the Police, and to treat the whole Police as one body, not as now, as the Police of each district and each thannah separate from the Police of another. At the same time he wished it to be understood that he did not accept the second reading of the Bill in the full sense of making an entire separation between Executive and Judicial functions of the Police. Even the Commission did not ask us to do that.

The Vice-President (Sir Barnes Peacock) said he agreed in the remarks which had fallen from the Hon'ble Member

for Bengal with reference to this Bill, so far as they related to the Penal Code and the Code of Criminal Procedure. It appeared to him (the Vice-President) that, when we should have these Codes in operation, there would be no necessity of having similar provisions in another Act. But that should not prevent us from passing the second reading of the Bill. At the time that the Madras Police Bill was brought into and passed by the Council, the Code of Criminal Procedure was not in such a forward state as to be passed. To enable the Madras Government, therefore, to establish a Police on the principle provided by this Bill, the Council were induced to allow the introduction into the Madras Police Bill of provisions similar to those contained in the Criminal Procedure Code, whereas, had the Code of Criminal Procedure been passed, he for one should have objected to the passing of the Madras Bill with the sections in question. He thought it very impolitic to have two Acts declaring the law on the same point. If this Bill should pass the second reading and be referred to a Select Committee, as the Code of Procedure would probably be passed before this Bill was reported on by the Committee, it would be easy for the Committee to omit all the clauses relating to Procedure.

As to the principle of separating the Judicial and Executive functions of the Police, he (the Vice-President) could not agree with the Hon'ble Member for Bengal. He (the Vice-President) had always been of opinion that a full and complete separation ought to be made between the two functions.

For these reasons he should support the motion for the second reading of this Bill.

Sir Bartle Frere said he was very much indebted to the Hon'ble Members who had spoken for the spirit in which they had received the Bill. He would only briefly reply to the observations of the Hon'ble Member for Bengal and the Hon'ble Member for the North-Western Provinces: First, with reference to what had fallen from the Hon'ble Member for North-Western Provinces, he (Sir Bartle Frere) would

remark that he should also have been glad if longer time could have been afforded for the consideration of the Bill before the motion for its second reading. His reason for proposing this Bill for a second reading before the vacation was two-fold, *first*, as had been observed by the Hon'ble Member for Bengal the Bill was an old friend with a new face. In its main principle it was identical with the Madras Act, which had been passed last year, and which had been found to work so well. And *secondly*, the matter was one of exceeding pressing moment, as he trusted he should be able to satisfy the Council. He would beg the Hon'ble Member for the North-Western Provinces to recollect that the Bill in its character was strictly permissive, and that no Government was obliged to adopt it until it was satisfied that the time had arrived for its adoption. He need not remind the Council of the necessity for this, when it was considered that, unless we had our executive machinery in order for carrying out the plan, it would be vain to adopt it, and that the organization of such machinery was necessarily a work of time.

The Hon'ble Member for the North-Western Provinces also referred to the opinions of several old officers who entertained doubts as to the principle of the Bill. They considered it suited well enough to England and Ireland and to the Presidency Towns, but not to the Mofussil. He (Sir Bartle Frere) would ask whether this objection was not met by an enumeration of the distant provinces in which such a Police had been tried and had been successful. The principle had been put in practice in Oude, in parts of the Bombay Presidency, in Sind and in great part of the Madras Presidency. It had also been tried at the three Presidency Towns, which, he stated on Saturday last, had taken precedence of all others in point of time as far as related to Police reforms. He did not think that a better place could have been selected for the trial than Oude, with a view to test the adaptability of such a Police to the Mofussil, and the result was that the Oude Police had been entirely successful in all those points in which

this Bill was concerned. He did not refer to the particular link at which the connection between the Police and the general Government was effected in Oude. But so far as the repression of crime and the giving the Executive Government a thorough hold over the criminal class of the population were concerned, the Oude Police had proved eminently successful. The principle had been applied in the greater part of the Madras Presidency, where the population was more sparse, and where in parts the people were far more difficult to control than in Bengal. He thought, therefore, that it could hardly be said that such a Police as was provided for by the Act was unadapted to the Mofussil, however suited it might be for the Presidency Towns.

The Hon'ble Member for Bengal had said that the Bill was not altogether a Police Bill, but that it trenched upon the Penal and Criminal Procedure Codes. Concurring generally in what we had heard from the Hon'ble and learned Vice-President, he (Sir Bartle Frere) would be quite ready hereafter to adopt the course which the Hon'ble and learned Gentleman had suggested, although this could not have been done at the time this Bill was framed, as neither of those Codes was then in existence. But the Hon'ble Member for Bengal seemed a little hard to please. When certain provisions in the Bill were borrowed from the Criminal Code, he complained that the framers of the Bill had stolen his thunder; and where provisions were omitted in the Police Bill which were contained in the Code of Criminal Procedure, he still complained that we had not adopted the provisions of that Code. In either way, he (Sir Bartle Frere) was ready to meet the views of his Hon'ble friend, either to omit from the Police Bill provisions contained in the Codes, or to borrow from them such provisions as might be necessary to make this measure complete.

The Hon'ble Member for Bengal next complained that all that have been done of late years to improve the Bengal Police had been ignored. He (Sir Bartle Frere) thought he stated last Saturday clearly and distinctly what had been done in

the matter in Bengal. Nothing was farther from his wish than to ignore what had been done in Bengal in the way of raising salaries and multiplying officers of trust. But if he could have gone more fully into the matter, he should have shown that beyond this, what had been done was not altogether in accordance with the principles of this Bill. What was done was simply to superadd to the existing rural Police, with all its vices and defects, certain semi-Military bodies imperfectly disciplined and very inadequately under the control of the Government. They were a loose and cheap and not a very good copy of the old Native Army, and performed no real Police functions except those of a protective or repressive kind for which the Native Army used to be employed. They were in fact copies of the Punjab Police Corps. In speaking of these Punjab Police Corps on Saturday last he had strongly expressed his sense of what we owed to them for their services during the mutiny. He (Sir Bartle Frere) believed it was quite impossible to exaggerate the value of such services. But they were services rendered as a Native Army, not as a Police; and as a branch of Police there was no doubt that these Corps were very expensive and not efficient when their few Police functions were compared with their cost. Now it was a principle of this Bill that Military duties should remain in the hands of the Military officers of Government, and that there should be no Military or semi-Military body not directly responsible to the Commander-in-Chief of the Army, a principle in which alone it might be said that the Army could be expected to stand.

The Hon'ble Gentleman then adverted to the probability of the large expenditute which would require to be incurred in order to give effect to the proposed measure in the Province of Bengal. He (Sir Bartle Frere) thought that in this matter the Hon'ble Gentleman rather anticipated the function of the Executive Government. It might be said to be an impossibility to give a good Police to Bengal without additional expenditure. It was an expense, however, which the Govern-

ment must face and provide for. Bengal had been worse provided for as regarded a Police than other parts of the country, and the Government of India felt that it owed a large debt to Bengal in this respect. Though the Hon'ble Member, reasoning from the analogy of Madras, expected that the additional cost in Bengal would be about 57 lakhs, he (Sir Bartle Frere) had no apprehension that the actual expenses would be so large as that, since a dense and peaceful population like that of Bengal was necessarily less expensive in the matter of Police than a country more thinly inhabited and peopled by some very unruly races like Madras.

The Hon'ble Member for Bengal then argued at great length in support of his opinion, that while he approved of the proposed organization of the Police, he disapproved of the Bill so far as Procedure and the Penal clauses were concerned. On this point he (Sir Bartle Frere) had already said that he was ready to have the matter considered in the Committee. But his Hon'ble friend went on to say that though the separation of the Judicial and Police functions was a principle of the Bill, and one of which he (Mr. Sconce) fully approved, it was not the aim of the Commission, and he quoted their 24th and 28th propositions as at variance with the principle. In reply to this charge, he (Sir Bartle Frere) would remind his Hon'ble friend, that it was one thing to lay down a principle, and another to act upon it at once and entirely, when it was opposed to the existing system, to all existing forms of procedure, and to prejudices of long standing. Under such circumstances it was often necessary to come to a compromise. In England, Police reforms were commenced in the time of Henry III., and the subject was vigorously taken up in the time of Elizabeth, but little effectual was done until the time of Sir Robert Peel. It took a very long time to carry out the principle of a Police separate from and independent of the Judicial Magistracy in the metropolis, and now, though more than 30 years had passed since the principle had been recognised by all the great authorities and by public opinion, in

England, it had not been fully extended throughout the United Kingdom. But every year some progress had been made, and he hoped that at no distant period the principle would be acted upon throughout India as completely as his Hon'ble friend could desire. The Hon'ble Member for Bengal had called this Bill a half and half measure. He (Sir Bartle Frere) could assure the Hon'ble Gentleman that nobody was more inclined that it should be made a whole measure than he (Sir Bartle Frere) was, and he should be very glad if his Hon'ble friend could only induce the Executive Government to give it their support, so as to effect a still more complete severance of the Police and Judicial functions than this Bill contemplated. The Hon'ble Gentleman, however, rather disappointed us at the conclusion of his speech by throwing out doubts as to his own entire concurrence in the principle of the Bill by quoting the authority of the late Lieutenant-Governor of Bengal as in favor of a different principle. He (Sir Bartle Frere) had every respect for that able administrator; but before he pinned his faith upon anything said on such a subject by anybody in India, he should wish to know the precise circumstances under which that opinion was given, and also the time when it was given. He would remind the Hon'ble Gentleman that in this matter opinion was progressive, and he would ask him to point out any man whose opinions on the subject had not undergone considerable changes during the past twenty years.

He hoped that he was wrong in drawing the conclusion from the Hon'ble Gentleman's remarks, that he recommended we should do nothing in this matter. He (Sir Bartle Frere) thought that this was a subject which imperatively called for immediate action. He might refer his Hon'ble friend to the authority of Sir Robert Peel and of all other English statesmen of modern days, and not the least among them to our lamented colleague, Mr. Wilson, but lest he should say that these were merely English opinions, he would refer him to the authority of Sir George Clerk, who was better qualified than any man

he knew, by his long official experience, both in English and in Indian public life, and by his intimate acquaintance with the manners and customs of the people, to speak on the subject. He would refer him to the authority of that great soldier and statesman, Sir Charles Napier, of Sir Charles Trevelyan, and though last, yet not least, of the present Lieutenant-Governor of the Punjab. His Hon'ble friend (Mr. Harington) seemed surprised at his appealing to the Lieutenant-Governor of the Punjab, and he (Sir Bartle Frere) believed that Sir Robert Montgomery had expressed pretty freely his opinion on this matter, putting his Hon'ble friend the Member of the North-West on his guard against what he had expected would be the recommendations of the Police Commission. But the Report of the Commission was not then before him, and he (Sir Bartle Frere) had such confidence in the impartial judgment of that able administrator and in the soundness of the general principles of the measure, that he was quite willing to leave the decision of the matter to him. If after full consideration of all the documents on the subjects, his opinion should be that the the measure was inapplicable to the Punjab, he (Sir Bartle Frere) was assured that such inapplicability would be found to be due only to temporary and local circumstances. But the greatest argument after all in favor of the measure was the financial argument. He would not repeat what had been lately said by the Secretary of State in Parliament, and by Mr. Wilson so often and so forcibly in that Council. Hon'ble Members were well aware that we had a large deficit to meet, which we could not do unless we make large reductions in our Civil expenditure, and the only portion of that expenditure which admitted of much immediate reduction was that on account of the Police. It was only by giving each Presidency a Police as efficient but less costly than it now possessed, that we could bring down our expenditure to a reasonable extent. We must remember that in this matter the necessities of Government were imperative. We must cut our coat according to our cloth. If we could have but one body to a duty which

had, heretofore, been performed by two bodies, the saving of expense was obvious.

The motion was then put and carried, and the Bill read a second time.

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## PART II.

### I.

### *Opinion of the High Court, 1864.*

*Extract from the Annual Report of the High Court for the year 1864 on the administration of criminal justice in the Lower Provinces, being letter No. 621 from H. T. Prinsep, Esq., Registrar of the High Court, to E. C. Bayley, Esq., Secretary to the Government of India,—dated Calcutta, 4th July, 1865.*

* * * *

26. The Court cannot, however, in this report but advert to a most important part of the administration of criminal justice, which has very recently formed the subject of correspondence with the Government of Bengal, as they are strongly impressed with the necessity for some reform in the present system, under which the country is, as a rule, deprived of the services of officers of considerable experience holding the position and rank of Chief Magistrates of districts. It is unnecessary, perhaps, to mention the circumstances which first drew the Court's attention to this subject, or to allude at length to the correspondence with the Government of Bengal which arose therefrom. It will suffice for the present purposes to bring to notice the excessively small amount of criminal work, not miscellaneous or appellate, done by the Chief Magistrates of districts, and to comment on the effect of this system on the administration of justice in our Criminal Courts. But before entering upon any discussion, the Court desire emphatically to state that it is far from their intention to attribute any neglect of their duties or blame to the officers of this class, whom they believe not to be surpassed in intelligence, zeal and industry by officers of any grade in any country. The Court rather desire to note the defects of the present system, under which the time of these officers, who in course of promotion

almost invariably become Judges, is almost entirely occupied in miscellaneous executive work—work which no doubt is very important and requires experience and intelligence, but which, inasmuch as it diverts the attention of Magistrates from their judicial duties, exercises a most pernicious influence on a department of the public service which yields to none in importance.

* * * *

But the Court consider that a perfectly efficient administration of justice requires that cases of peculiar intricacy should be investigated by officers of the highest experience, that is, by the Chief Magistrates of districts. This is rendered more necessary by the peculiar system under which appointments to the bench are regulated, and which requires that these officers should not only keep themselves familiar with their work, of which as Joint-Magistrates they have already acquired considerable experience, but should, far from allowing that familiarity to become diminished by want of exercise, by continual and daily practice, so strive to increase their acquaintance with the criminal laws that, on taking their seat on the Judicial Bench, they may be thoroughly furnished with the knowledge necessary to the proper and efficient discharge of their duties. This, under the present system, under which the Chief Magistrate rarely devotes himself to other than miscellaneous or appellate criminal work, cannot be attained, and the Court attribute to the continuance of this system many of the errors of which Sessions Judges are guilty, and which frequently cause great injustice. That the appointments of Judges should be conferred on officers whose training as regards civil law is confined to cases coming under the rent law, is much to be regretted, but the Court hold that if this is at present beyond remedy, the Government are bound to secure the utmost possible efficiency on the part of Sessions Judges. As this is within the power of Government by a reform of the present system, under which Chief Magistrates are oppressed with various executive duties, which can be as efficiently

performed by separate services, the Court trust that the discussion which has arisen may, by causing Magistrates to be relieved of many of these executive duties, lead to the desired improvement, the more so as the Court observe that His Honour the Lieutenant-Governor of Bengal and all the Commissioners, except one, approve of the theory that cases of peculiar intricacy should be taken up by the Magistrate, and the only difficulty occurs in the carrying out of it in practice, in consequence of the press of miscellaneous duties.

II.

*Opinion of the High Court, 1866.*

*Extract from the Annual Report on the administration of criminal justice in the Lower Provinces for the year 1866, being letter No. 874A from C. D. Field, Esq., Registrar of the High Court, to the Secretary to the Government of India.—dated 27th July, 1867.*

(The Report emanated from the following Judges:—The Hon'ble Sir Barnes Peacock, *Chief Justice*, Mr. Justice Loch, Mr. Justice Bayley, Mr. Justice Norman, Mr. Justice Kemp, Mr. Justice Seton-Karr, Mr. Justice L. S. Jackson, Mr. Justice Phear, Mr. Justice Macpherson, Mr. Justice Markby, Mr. Justice Glover, Mr. Justice Hobhouse, Mr. Justice Dwarka nath Mitter.)

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The Court has for several years considered it necessary to express a strong opinion as to the detrimental effect on the judicial service of the existing system of administration, by which the Magistrate and Collector, whose next step in promotion is ordinarily to a judgeship, is so hampered with the weight and the multiplicity of executive and administrative duties, that in most districts he has but little, and in some (such as Nuddea) no time for the performance of any judicial duties except the hearing of appeals in unimportant cases. During the past year there has indeed been some increase in the aggregate quantity of judicial work transacted by the Magistrates of dis-

tricts, as will appear from a comparison of Statement XI with Statement X½ submitted with last year's report. Practically, however, but few Magistrates of districts find leisure for any such judicial work as is likely to benefit them much in their career as Judges ; and those officers who can, or do, make time to take a share of the more important judicial business, are, generally speaking, those in charge of the smaller or subordinate districts such as Noakhally, Furreedpore, Pabna and Balasore, where miscellaneous duties are comparatively few and light. In a few other instances, perhaps the absence of subordinates exercising full powers compels the Magistrate of the district to dispose of a considerable portion of judicial business.

The Court cannot close this report without endeavouring to direct the attention of the Government in connection with this subject to the adoption of some measures by which those officers who fill the highest places on the judicial bench in the Mofussil may be enabled to come to this important position not wholly untrained for the responsible duties they have to perform. I am to observe that, in the opinion of the Court, there can be no doubt that in Lower Bengal (and it is important to bear in mind that observations referring to the Lower Provinces are frequently quite inapplicable to other parts of India) the time has arrived at which the necessity of separating the *judicial* from the *executive* branch of the service must be fairly looked in the face, and the means of accomplishing the separation carefully considered.

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### III.

*Opinion of the High Court, 1867.*

*Extract from the Report on the administration of criminal justice during the year 1867, being letter No. 927 A. from C. D. Field, Esq.; to the Secretary to the Government of India, Home Department,—dated 2nd July, 1868.*

*Para 31.*

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The separation of the judicial from the executive branch of

the service has, the Court are glad to find, already occupied the attention of the Secretary of State for India, and as the Judges, at the request of His Excellency in Council, are about to express their opinions on this subject at an early date, they do not enter on the question in the present report.

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## IV.

### *Opinion of the High Court, 1869.*

*Extract from the Annual Report on the administration of criminal justice in the Lower Provinces for the year 1869, being letter No. 1024 A. from J. S. Carstairs, Esq., Officiating Registrar of the High Court, to the Secretary to the Government of India, Home Department, dated Calcutta, 3rd September, 1870.*

(The report emanated from the following Judges:—The Hon'ble Sir R. Couch, Kt., *Chief Justice;* Mr. Justice Loch, Mr. Justice Bayley, Mr. Justice Norman, Mr. Justice Kemp, Mr. Justice Louis S. Jackson, Mr. Justice Phear, Mr. Justice Jackson, Mr. Justice Markby, Mr. Justice Mitter, Mr. Justice Hobhouse, *Judges of the Court.)*

The Court, in submitting for the consideration of His Excellency the Governor-General in Council this report on the administration of criminal justice, cannot but feel how imperfect is their supervision of this very important and extensive department, and they consider it their duty to explain why the fact is so, and point out the very different relations existing between the High Court and the inferior tribunals of civil and criminal jurisdiction respectively.

The administration of justice in civil matters is entrusted to officers who, in regulation districts at least, are entirely subject to the authority of the Court, and these officers are distinctly subordinate to one local head.

The officer nominally responsible to the Court for the state of criminal justice in each district is the Sessions Judge, and this officer actually transmits the annual report which accompanies the figured statements.

But the Court of Session in which the Judge presides has only a limited original jurisdiction and a small appellate jurisdiction, while administratively he has been gradually deprived of all control over his theoretical subordinates.

The real head of the district in matters criminal is the Magistrate, who is also a Collector, and in this two-fold capacity is subject to the Commissioner of the Division.

In many matters of detail also the Government of Bengal issues instructions to the Magistrates through the same channel, and thus the influence of the Court over these officers is naturally and inevitably weakened.

The Court has no complaint to make on this point: as long as public duty is done, it matters little whether it be done by one agency or another. But it might be well that things should be fairly understood, and that either the magistracy should be placed in entire subordination to the Court, or that the Court should be relieved from a responsibility which it has no longer the means of turning to the public advantage.

The Governor-General in Council will perceive that the only way in which the former alternative can be accomplished is by a complete separation between duties executive and judicial, the latter branch comprising both civil and criminal justice.

Such a system for the Lower Provinces of Bengal is believed to be now under the consideration of Government, and the Judges have already expressed their opinion as to its expediency.

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## V.

## CORRESPONDENCE REGARDING THE NECESSITY OF DISTRICT MAGISTRATES DEVOTING MORE OF THEIR TIME TO THE DISPOSAL OF ORIGINAL CRIMINAL CASES AS SUGGESTED BY THE HIGH COURT.

### *Opinion of Mr. Craster, C. S.*

From E. C. Craster, Esq., Magistrate of Monghyr, to the Commissioner of the Bhaugulpore Division—(No. 600, dated Monghyr, the 4th December, 1866.)

I have the honor to acknowledge the receipt of your memorandum No. 359, dated 23rd instant, forwarding a copy of a letter from the Under-Secretary to the Government of Bengal, No. 5076, dated the 6th idem, with its enclosure, and calling for the report required by paragraph 2 of that letter.

The Under-Secretary therein asks for any particular suggestions by which the object of enabling District Magistrates to devote some considerable portion of their time to the disposal of heavy criminal cases, without any detriment to the executive managememt of their districts, may be attained.

2. It appears to me that the only way by which the inconvenience and clashing of duties complained of, not now for the first time, can be completely avoided, is to separate the judicial from the executive branch of the service : anything short of that, any partial reform by which the bases of existing arrangements should be maintained, and duties of both branches of the service continue to be entrusted to the same hand, could, in my opinion, be but a temporary measure ; looking at the rate at which those duties now lately increased and are still increasing, a short time only would elapse before some further re-arrangement would inevitably be found necessary. I think. therefore, that no measure short of a total separation of the two classes of duties now discharged by a Magistrate and Collector, and the creation of two distinct branches of the service—one being the executive and the other the judicial—would permanently effect the desired object.

3. The proposed separation may be effected thus,—to each district now under the charge of a Magistrate and Collector let there be appointed two officers, one to have charge of the executive, the other of the judicial duties; the former should be styled Deputy Commissioner of Revenue and Police, and should be, as his title would indicate, immediately subordinate to the Commissioner of the divison; the latter should retain the title of Magistrate, but should cease to have any connection with the revenue or police departments, and to discharge any executive duties whatever.

4. It may be objected that the carrying out of this plan could not be effected without a largely increased expenditure, and that in fact it would be nothing more or less than appointing two men to do work which at present one is found able to perform. I think, however, that the objection on the score of increased expense is one which might be in great measure removed if, simultaneously with the introduction of the proposed reform, some other changes were made; for instance, a Magistrate might be entrusted not only with criminal, but also with civil duties, and might thus become and consequently be styled an Assistant Judge; this change might be found to render possible a decrease in the existing number of subordinate Civil Judges, and a consequent saving of the salaries of those whose services might be dispensed with. The Magistrate might also be entrusted with certain of the powers of a Sessions as well as of a Civil Judge, such as would enable him to try some of the minor cases sent to the sessions by the subordinate magisterial officers; the relief thus given to Sessions Judges would probably enable them to dispose of the business of their offices with such punctuality that arrears should not be allowed to accumulate, and hence would arise the possibility of dispensing in future with the services of additional Judges, by which a further saving might be effected. Again, many of the officers now serving as Joint-Magistrate and Deputy Collector of the 1st grade under Magistrate and Collector might be taken to fill some of the new appointments, and the salaries which they now

receive should be deducted from the gross amount of increase. I do not pretend to say that the total amount of these and other savings, which the introduction of the measure proposed might be found to render possible, would quite equal the additional expenditure which it would undoubtedly entail. I admit at once that the reform here suggested could not be carried out without some increase of expense ; the question then to be considered is, whether it is worth the probable cost or not ; I think it undoubtedly is.

5. In the first place the object, which in the Under-Secretary's letter is justly termed a very desirable one, would be thereby not only fully attained for the present, but it would be permanently secured for the future : the Magistrate of a district relieved, as I have proposed he should be, of all the important judicial work of his office, no ground for complaints, such as those made by the High Court in two consecutive years, could hereafter possibly arise. *Secondly*, the training which the Magistrate would receive would be of a kind infinitely better calculated to fit him for the office of a Judge than any which he can get under the present system, for he would be regulary engaged in the discharge of duties in all respects identical with those of a Judge's office. As Magistrate he would dispose of most of the important criminal cases cognizable by Magistrates occuring in his district, and as Assistant Judge he would try such civil and minor sessions cases as the Judge might make over to him. I would also propose that he should be invested with the power to try suits for the recovery of arrears of rent, &c., and to hear appeals in the same, which the Collector now exercises : he would thus have ample opportunity to learn, by actual practice, the whole work of a Judge's office ; and the experience which he would gain in the performance of the duties which I would assign to him, would be far beyond any that a Magistrate and Collector of the present day can possibly obtain. *Thirdly*, the relief which would be given would enable both branches of the service to discharge their duties with an energy and a

punctuality and an amount of attention to them such as are at present extremely difficult of attainment. I think that these advantages alone are worth the additional expenditure which the introduction of the proposed reform would probably involve.

6. To the second objection, namely, that the probably plan would be merely an appointment of two men to do work which one is at present found able to perform, I would merely answer that if one had been really found able to perform it, there would have been no cause for the complaints now under consideration. I believe that in the great majority of districts no one man could perform, with real satisfaction to the Government, to the public, and to himself, the whole of the work which now devolves upon a Magistrate and Collector, including, of course, a fair share of the important judicial work of the district. It is certain that a large number of Magistrates and Collectors do not do it, and I do not think that I judge too favourably of them when I conclude that they do not do the work merely because it is impossible for men of average ability and quickness in the despatch of business to get through it ; I think that a fair consideration of the circumstances which have led to the call for this report will show that the objection which I have now been noticing is really baseless.

7. It may be necessary to add a few words on the subject of the new class of appointments which I would propose to create, those, *viz.*, of Deputy Commissioners ; to these officers would be entrusted the discharge of all duties other than those which are purely judicial, now devolving upon the Magistrate and Collector ; an objection may possibly be raised to this portion of the scheme on the ground that officers holding these appointments would not have an amount of work sufficient to occupy their time or to warrant the creation of the offices which they would hold ; the answer to this is obvious : the work which they would have to do is precisely that which now in so many instances occupies the whole time of a Magistrate and Collector, and thereby prevents him from bestowing his atten-

tion upon the judicial duties of his office. To raise this objection is merely to say in other words that the excuse now made by all officers who plead the engrossing nature of their executive, as a reason for non-attention to their judicial duties, is altogether groundless ; I am of an entirely different opinion, and consequently I consider this objection to be itself without good foundation.

8. I am quite aware that the plan which I have proposed is not brought forward for the first time, and that it has few or no claims to originality ; but I believe that whenever it has been proposed, it has always found favour with, and been supported by, some men well able and qualified to pronounce an opinion upon its merits. I entertain little doubt that it is one which must eventually be adopted, and I therefore take this opportunity of again submitting it for the consideration of Government, in the hope that the time for carrying it into execution may be thought now to have arrived ; it is the only plan that I can suggest which appears to me really calculated to obviate permanently the great inconveniences of which complaint is now justly made.

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## VI.

### *Opinion of Mr. F. M. Halliday, C.S., summarised by Mr. Dalrymple, C.S.*

From J. W. Dalrymple, Esq., Commissioner of the Patna Division, to the Secretary to the Government of Bengal, Judicial Department—(No 7, dated Patna, the 9th January, 1867.)

* * * *

*Sarun.*—The Magistrate of Sarun, Mr. F. M. Halliday, states that it does not appear to him that under the present system so much of the District Magistrate's time as the High Court would seem to require can possibly be devoted to the disposal of heavy criminal cases without considerable detriment to executive management of districts, and that he is unable

to submit any practical suggestions that would not involve either the removing from Magistrates and Collectors of much of the executive work now in their hands, or the separation of the two lines of judicial and executive, or again a reversion to the old system, and both of these measures are open to grave objections. Thinks that no plan can be better fitted to carry out the object which the High Court have in view, than the introduction of a system by which the functions of executive and judicial would be separated. This, he says, is no original suggestion, being one which was brought forward in 1853 in a note by the then Secretary to the Government of Bengal, in which the equalization of the salaries of the chief executive and judicial officers, and placing them both in subordination to the Commissioner, &c., &c., were advocated.

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## VII.

### *Opinion of Mr. Jenkins, C. S.*

From R. P. Jenkins Esq., Offg. Commissioner of the Bhaugulpore Division, to the Under Secretary to the Government of Bengal, Judicial Department.—(No. 17, dated Bhaugalpore, thd 16th January, 1867.)

I have this day received your office letter No. 266 of the 12th instant, calling for the submission, without delay, of the report required by your circular No. 5076 of the 6th November last, on the subject of the necessity of the District Magistrates devoting some considerable portion of their time to the disposal of heavy criminal cases.

2. Mr. Money I find, called for and obtained the opinion of the District Officers of Darjeeling, Purneah, Bhaugulpore, and Monghyr, and the report from Mr. Craster contains so precisely my own views on this matter, that I cannot do better than forward you a copy of it for the consideration of Government.

3. There is, I think, no doubt but that as matters stand it is simply impossible for the District Magistrate and Collector to do more criminal work than he does now, and I am satisfied

that nothing short of separating the criminal judicial work from the revenue and general administration department and appointing an officer at the head of each in almost all, if not all, the districts of Bengal, will meet the end in view.

4. I would here, however, respectfully beg to point out that although the remarks of the High Court are no doubt generally correct, yet that it appears the fact of all Magistrates and Collectors having at one period (and that a very long one too) of their service undergone a very considerable and practical apprenticeship in investigating important criminal cases of all kinds, weighing evidence of every character, and forming judgments on nicely balanced points, has been somewhat lost sight of. The present Joint-Magistrate of a district goes through some eight or nine years (or even more) training in such subjects, and during that interval has probably disposed of all the heaviest cases in his district, so it cannot be said that he is wanting in practical knowledge of such matters. The criminal work he has done in those years has gone up in one shape and another to various Judges and to the High Court itself, so that after all the worst that can happen is that for some few years, during which he is promoted to the charge of district, and before he is elevated to the bench, his practical knowledge is allowed to lie, comparatively speaking, dormant.

5. I have purposely not touched on Mr. Craster's suggestions, for, as I have before said, they exactly express my own views, and are precisely those I had intended to offer had the subject been ready for report when I was officiating as Commissioner of Burdwan. I therefore beg to recommend them stongly for the favourable consideration of His Honour the Lieutenant-Governor.

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## VIII.

### *Opinion of Mr. C. F. Montressor, C.S.*

From C. F. Montressor, Esq., Commissioner of the Burdwan Division, to

the Secretary to the Government of Bengal, Judicial Department— (No. 16, dated Burdwan, the 19th January, 1867.)

Pursuant to the orders of Government contained in your letter No. 5076 of the 6th November last, I have the honour to submit the following remarks :—

2. The High Court have remarked that they have again to point out the fact that Magistrates of districts devoted very small portion of their time to judicial duties : two cases are instanced in which such duties have been altogether neglected, and I have been directed to submit any practical suggestions by which the object may be attained, namely, that by which Magistrates can give up a considerable portion of their time to the disposal of heavy criminal cases.

3. As the subject is one of general importance and application, it is not necessary for me to refer to particular districts in the division, which vary as much in size as they do in importance, and in which there is no equality of work, some having a full complement of officers, such as Magistrate and Collector, a Joint-Magistrate and a covenanted assistant, with a number of European and native deputies, while others again have no Joint-Magistrate.

4. I think it is sufficient for the purpose of the present question to apply the remarks that I am about to make to what is known to be a "first class" magistracy.

5. As to the necessity for which the High Court contend, there cannot, I think, be two opinions, but under the existing system and constitution of the united offices of Magistrate and Collector, the officer holding both offices cannot, except by a most unusual effort, do justice to the judicial departments under him.

6. During the last seven years the miscellaneous duties of the head district officer have become so increased that the whole of his time is absorbed in them, and it has now become almost an impossibility for such an officer to proceed on a tour in the interior of the district (so essential a part of his duty) without neglecting some important business that requires

his attention at head-quarters and causing delay of his other duties.

7. I believe, and my experience confirms my remarks, that no officer can properly perform judicial duties unless he is perfectly secure from interruption.

8. To take and record evidence and conduct a trial to a sound conclusion demands complete concentration of the attention, unbounded patience, and complete security from interruption, which cannot be expected by the Collector-Magistrate, much, or I might say wholly, as they may be considered essential to justice and decorum.

9. When once in office the Magistrate is never safe. Some one has invariably some subject connected with his multifarious duties that must be attended to, and the Magistrate, seeing and knowing this, cannot allow the whole executive machinery of his district to come to a standstill.

10. It is in my opinion impracticable to arrive at the wishes of the High Court, unless the Government will set apart fixed days in the week on which the Magistrate should give his entire time to judicial duties. I admit that I should be sorry to see such an order promulgated, but if the object in view is worth one day's work, I do not see that there would be any actual *difficulty* in the Collector-Magistate carrying out the order, provided that he be *entitled* to refuse all executive work not imposed on him by law on that date ; if it be left to the Magistrate to select important cases, or he be reminded to do so more frequently, the order will fail to attain its object. Moreover, the importance of a case is not always apparent at first sight, or until the trial has been partly got through, and certainly as regards practice, there is just as much useful application in trying petty cases as there is in what are known as "heavy" ones.

11. It will not escape observation that the District Magistrate is expected to know as much of police cases as his subordinate,—the District Superintendent of Police : he watches these cases, suggests, even directs modes of the action

of the Police, and necessarily takes as much interest in pursuing and bringing to trial criminals as that officer.

12. Under such circumstances it is not surprising that the actual Head of the Police should evince some delicacy in sitting as Judge in cases which he has already watched and promoted up to the very moment of prosecution, more especially as the very principle on which the new constabulary has been organised, and the tendency of all modern reform in this country point to the expediency of affording to all criminals a positively impartial and uninfluenced Judge.

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## IX.

*Opinion of Mr. R. B. Chapman, C. S.*

From R. B. Chapman, Esq., Officiating Commissioner of the Presidency Division, to the Secretary to the Government of Bengal, Judicial Department—(No. 16Ct., dated, Krishnaghur, the 14th February 1867.)

I have the honour to submit the report called for by Government orders No. 5076, dated 6th November, upon the question how District Magistrates can be enabled to devote some considerable portion of their time to the disposal of heavy criminal cases, with special reference to their training for the office of Sessions Judge.

* * * *

3. I gather from the remarks of the High Court, both this year and last, and from other indications in the correspondence, that little, if any, blame is attributed to the chief executive officers of important districts for not taking more part in judicial work. It is admitted, more or less freely, that the system, not the officers, is responsible for this ; and I hardly think it necessary to spend much time in proving that this is the fact.

4. There can, I think, be no doubt that the present tendency of administrative development in Bengal is directly to place the original administration of justice, so far as the revenue and criminal departments are concerned, in the hands

of subordinate officers, superintended indeed generally by their executive superiors, but controlled and checked chiefly by the judicial authorities. The strength of the district officers in the most advanced districts in Bengal is reserved for, and absorbed by, their constantly increasing executive duties. The district officer of such a district is in fact a "sub-Prefect," as the Commissioner of the division is a "Prefect" under the Lieutenant-Governor, and neither one nor the other officer has the time for judicial duties, which indeed he could perhaps hardly perform without some anomaly.

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16. Is it then desirable and possible to remodel the system of administration entirely so as to remedy the evils to which the High Court and the Government attach so much importance? For there is no doubt that the present system does present some startling anomalies, and that it does not provide any apparent, *regular*, and *unintermitted training* for either branch of the service.

17. I would venture, at this stage, in the first place, respectfully to suggest some slight doubt whether this regular training is so very essential as is assumed. The theory and principle is indeed clear enough, but yet in practice I do not know that in any country it is strictly obeyed. Certainly, so far as the administration of *criminal* justice is concerned, and it is to that that the High Court chiefly refers, it is in our own country totally disregarded, or nearly so. It is notorious that in England practice in the criminal courts is held in somewhat light esteem by the members of the bar; and it is seldom indeed that a barrister of extensive criminal practice is advanced to the bench, so that the Judges of England have not, as a rule, the training to which the High Court attach so much importance, yet the administration of criminal justice in England is the pride of the country and the admiration of the civilised world.

18. I think, on the other hand, that it is not quite certain after all that the official life of an Indian Civilian, whose duties are of a nature to develop intellect, judgment, and self-reliance

in a high degree, who, if he has capacity at all, must acquire a wide and varied experience of the habits and relations of the people, is altogether a bad preparation for the duties of a Judge. He lacks indeed, at some stages of his career, and to some extent, a daily practice in the laws that he is to administer, but this is after all a mechanical affair compared with the general knowledge of men and things that he acquires.

19. Nevertheless, I think that these remarks are in their nature conservative and apologetic, and I do not deny that it would be well if our practice and system were more in accord with right principles. It would, I acknowledge, be desirable that there should be a distinct separation throughout of the judicial from the executive service. The question is, can any practicable plan be suggested whereby this can be attained ?

20. It is clear enough, I think, that it will be attained, if even in one of two ways only, either by nearly doubling the existing number of officers and so providing separate judicial and executive staffs with jurisdictions, not larger than the existing jurisdictions, or by nearly doubling the existing areas of jurisdictions and so without increasing the existing staff of officers, providing separate judicial and executive officers with very much larger areas of jurisdiction than the present. It will be observed that I am treating the subject completely, and not supposing that if it be determined that the administration shall be reconstructed on logical principles, and by a royal road, it will be thought right to confine the application of those principles to certain grades of the Civil Service only. It is in principle as incongruous that a Sub-Divisional Officer should exercise, simultaneously, extensive executive and extensive judicial powers, as it is that a District Officer should do the same.

21. If the Government perchance think otherwise, then the principles that I have asserted, and the deductions that I proceed to make, can with ease be applied to any limited section of the administrative staff of the country.

22. With this proviso then, I think, I must say that

for the first of the two alternatives stated in the 20th paragraph, the country simply cannot as yet pay. It cannot afford to have throughout the administration complete separate judicial and executive staffs with areas no larger than the existing or designed areas of jurisdiction. If it could, there can be no doubt that would be a very desirable improvement, a very valuable administrative luxury.

23. But it is worth while, in the pursuit of theoretic perfection of principle, to adopt the other alternative,—to enlarge the areas of jurisdiction for the sake of supplying a more correctly constituted administration in those larger areas. I think I must say no. The people highly appreciate the accessibility of the courts and officers now being provided, and would certainly dislike any change by which they should become less frequent ; and I cannot say that I think they would be wrong. I would rather have more centres of jurisdiction with an administration not constructed on principles of logical perfection than fewer centres with a perfect administration.

24. There remains one more remedy to discuss. In the non-regulation provinces, the evil judged by the High Court does not, so far as I know, exist : it is provided against by the total obliteration of almost all distinction whatever between the executive and the judicial. The same individual is, from the first, Civil Judge, Magistrate, Revenue Officer and everything else, and so he continues with gradually increasing powers throughout his service. There is no want of training therefore in those provinces for any and every department, though there may be, perhaps, some fear of an officer burdened with such incongruous duties being "Jack of all trades and master of none !"

25. In the regulation provinces this system is vastly different. The administration of civil justice, with the important exceptions of rent suits (and that distinction ought to be abolished,) is throughout in the hands of a body of officers who have no executive duties ; and in the higher stages, the administration of criminal justice is, in like manner, taken entirely out of the hands of the executive. So also in some

of the intermediate stages the Joint-Magistrate is employed almost exclusively on judicial duties. So that there is in the regulation provinces a constant struggle as it were, nay, a very considerable advance already from the dead level of patriarchal administration towards correct principles.

26. The question is shall we go back? Shall we give up the hope of future advance because of certain attendant intermediate incongruities, and for the sake of securing at any rate an apparent training for our officers throughout the service? As to the higher grade of the service, I think the question may be at once contemptuously dismissed. Civilization cannot so far retrograde. But as to the Joint-Magistrate, it will be observed that the Collector of the 24-Pergunnahs suggests that he be transmigrified into a Collector with concurrent powers only subordinate to his chief, and no doubt this might make it possible for the two together to divide their duties so as to give them each time to devote to judicial work.

27. But setting aside the important objections that this would seriously imperil uniformity of district administration, it would, in my opinion, be a step altogether backwards. For the principle of the division of labour is at least as important in intellectual and political as in mechanical operations, and it seems to me to be beyond a doubt that the work will be better done if one officer takes the whole judicial work and the other the whole executive, than if all the work is jumbled together and divided between the two. I do not see why the people should be made to suffer in this way in the pursuit of the more distant object of keeping up the training of the superior officers, which may, as I have shewn, be going on all the while in a very effectual way.

28. Rather would I accept the existing division of labour as in accordance with the soundest principles, and look forward to its future and constant development, though I am not, at the present moment, able to point out how this development is to be effected, or to specify anything that should now be done in furtherance of it.

29. For I do not at all despair of gradual progress in this direction, and I certainly think that it should be, by the Government, kept steadily and constantly in view. I have little doubt that it may be found possible eventually, without so serious a sacrifice of economy as appears at first sight inevitable. Whether the reunion of the offices of Magistrate and Collector some years back was right and in accordance with this progress or not, I do not stay to inquire. It is certainly open to very great doubts. But at any rate the office as it now exists is an executive office, if there is an executive office in the country, and the more it is developed the more completely executive does it become. I cannot think that it is consistent with sound principles to insist upon the engraftment of judicial duties upon such an office, or that the apparent prevention of a breach in the training of an officer who may, perhaps, presently become a Sessions Judge, is a good that will counterbalance the evil of interposing to stay an administrative development that is really, I believe, in full accord with proper principles.

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## X.

Note by the Officiating Secretary to the Government of Bengal, Mr. H. L. Dampiter, B. C. S., dated 27th August, 1867.

* * * *

6. I say, with Mr. Jenkins, that my views are so exactly represented by Mr. Craster in his report of 4th December, 1866, that it is needless for me to repeat them. I am convinced that the only true and *lasting* solution of the difficulty is a complete separation of Judicial and Executive duties.

7. Mr. Chapman, in paragraph 20 of his report, points out that it will be impossible to carry out this separation down to the sub-divisions without an enormous increase of cost, and that the principle of uniting Judicial and Executive functions is as incongruous for a sub-divisional officer as for district officer. But, in so doing, he seems to me to lose

sight of our starting point. The present question is how to give a proper judicial criminal and civil training to those officers who eventually rise to be District Judges. This does not touch uncovenanted officers in charge of sub-divisions, nor does it touch uncovenanted officers at the early stage of their career. We do not now profess to be able to carry out fully the principle of separating Judicial and Executive functions entirely ; but if in our endeavours to produce a set of covenanted officers, who are well trained for the duties of District Judges, we can carry out the good principle of separating Judicial and Executive functions in the higher ranks, to say that we cannot carry it out down to the lowest, is surely no objection.

The system which I should like to see adopted, is this :—

1st—Covenanted officers to be employed in both Executive and Judicial duties until they have passed through the present second grade of Joint-Magistrates (Rs. 700).

2nd.—Each officer then to elect whether he will take the Judicial or Executive line, such election being of course subject to the approval of Government, with reference to the general requirements of the service.

3rd.—Salaries of the different grades of Judicial and Executive appointments to be equalized, the present Joint-Magistracies being abolished, and the district appointments being—

*Executive :*

(1) Deputy Commissioner.

*Judicial :*

(1) Judge.

(2) Magistrate and Assistant Judge.

The latter officer to take the present appellate jurisdiction of the Collector in Act X cases.

8. The scheme would necessarily involve some increase of cost, and a re-adjustment of grades and salaries would be necessary so as to render the attractions of the two lines as nearly equal as possible, step for step. In so doing, it would be

necessary to reduce the present aggregate pay of the District Judges, in order to compensate the Deputy Commissioners (Collectors) for the loss of their eventual rise to Judgeships. The Judicial line would not really suffer thereby, for the Collectors being thus taken out of the field of competition for Judgeships, the Judgeships would be attained much earlier in life.

* * * *

13. In an annual report which has just come in, the High Court urge that the time has come for completely separating the Judicial and Executive branches of the administration.

## PART III.

### I

No. 1735.

*From E. C. Bayley, Esq., Secretary to the Government of India, Home Department, to the Secretary to the Government of Bengal, Judicial Department,—dated Fort William, 9th April, 1868.*

With reference to the correspondence marginally noted, I am directed to forward the accompanying extract (paras. 2 and 3) from a despatch from the Secretary of State, No. 11, of the 10th of January last, and to request that the Government of Bengal will favour the Governor-General in Council with an expression of opinion on the following points:—(1) Whether it is expedient that a distinct judicial branch of the Civil Service should be formed, the members of which should be trained specially for the duties of the Bench, and should not look for advancement beyond the sphere of those duties, and (2) whether there are any difficulties in accepting the principle of such a change absolutely with regard to the Indian Civil Service.

| | | |
|---|---|---|
| From Govt. of Bengal, | | No. 1956 of 24th Mar., 1859. |
| To | do. | No. 863 of 28th Apl., 1859. |
| To | do. | No. 2359 of 26th Nov., 1859. |
| To | do. | No. 427 of 15th Feb., 1860. |
| To | do. | No. 1254 of 7th July, 1860. |
| From | do. | No. 3439 of 28th June, 1860. |
| From | do. | No. 440 of 17th Aug., 1860. |
| From | do. | No. 664 of 12th Nov., 1860. |

The Governor-General in Council would be further helped to a judgment on this important question by the opinion of a select number of officers of experience and distinction serving the Government of Bengal.

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### II.

*Extract, Paras. 2 and 3, from a Despatch from the Rt. Hon'ble Sir Stafford H. Northcote, Bart., Secretary of State for*

*India, to His Excellency the Rt. Hon'ble the Governor-General of India in Council.—No. 11, (Public, dated India Office, London, 10th January, 1868.)*

*Para.* 2.—It is the opinion of some that the present civil administration of India is defective in this respect: that no sufficient distinction is maintained between the classes of officers called on to fulfil functions so widely different as those of the ordinary administrative branches and of the judicial. It has been suggested that such an alteration might be made in the system of promotion, which now obtains among civilians as would obviate the common occurrence of a transfer to the Judicial Bench of men who have had no special preparation for the performance of its duties, and are too old to commence the necessary training.

*Para.* 3.—I shall be glad to have your opinion on this subject, and any proposals which you may make to obviate evils, which I find to be the subject of general complaint, will meet with my ready concurrence.

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## III.

*Extract from a letter of the Hon'ble Ashley Eden, Secretary to the Government of Bengal, Judicial Department, to the Secretary to the Government of India, Home Department, dated 1st December, 1869, embodying the views of Sir William Grey, then Lieutenant-Governor of Bengal.*

Your letter No. 1735, dated 9th April, 1868, asks for an expression of opinion on the part of the Government of Bengal as to (1) whether it is expedient that a distinct judicial branch of the Civil Service should be formed, the members of which should be trained specially for the duties of the Bench, and should not look for advancement beyond the sphere of those duties; and (2) whether there are any difficulties in accepting the principle of such a change absolutely with regard to the Indian Civil Service.

2. The subject is one which has more than once forced itself upon the attention of the Bengal Government since 1859, when the correspondence referred to in your letter took place. In their Report* on the Criminal Administration of the Lower Provinces for 1864, and again in that for 1865,† the High Court brought prominently to notice the fact that under existing arrangements the Magistrate-Collectors of districts habitually took up so little judicial work, that instead of acquiring in that post judicial experience and gaining qualification for the office of Judge, to which they were ordinarily promoted, officers were absolutely losing the good effect of the judicial training which, as Assistants and Joint-Magistrates, they had enjoyed. The Lieutenant-Governor caused the remarks of the Court to be communicated to the Commissioners of divisions, and asked for any practical suggestions by which the object of keeping up the judicial training of the Magistrate-Collectors might be obtained without detriment to the executive management of districts.

* Paragraph 26.

† Paragraph 23.

3. The replies have been printed in a pamphlet which is annexed to this letter, together with an extract from a note on the subject by Mr. H. L. Dampier. It will be seen that the great preponderance of opinion among officers who have a practical knowledge of the question is in favor of the view that under the existing system, which throws upon one officer the superintendence of all executive duties in a district as well as a considerable judicial appellate jurisdiction in petty criminal cases and in rent suits, it is quite impracticable that the Magistrate-Collector should himself take any appreciable part in the original judicial work of the district. A complete separation of judicial and executive functions is pointed to by more than one officer as the only effective solution of the difficulty.

4. In the 23rd and following paragraphs of his report on the changes of the executive machinery of Bengal, suggested by the experience of the famine, Mr. George Campbell, having

in view mainly the object of strengthening the executive Government, has also dwelt strongly on the expediency of separating the executive and judicial branches of the service.

5. On receipt of your letter under reply, the officers named on the margin were consulted. Their replies are annexed, and the Lieutenant-Governor would especially draw attention to the replies of Messrs. F. R. Cockerell and A. R. Thompson. The arguments in favor of a complete separation between the judicial and executive lines, or rather the consideration which make it absolutely necessary that civil servants who are designed to fill the higher judicial offices in the districts should receive the best possible training to fit them for such posts, are so fully set forth in these communications, that it is only necessary here briefly to recapitulate them.

Mr. A. Money.
,, R. B. Chapman.
,, F. R. Cockerell.
,, A. R. Thompson.
Lord H. U. Browne.
Mr. W. J. Herschel.
,, J. Monro.
,, H. Bell.
,, J. Westland.

* * * *

8. The Lieutenant-Governor is satisfied that the progress of events has been such that, if our administration of justice is to command respect and secure confidence, the special qualifications of those who preside over the highest local Courts must be materially improved, and that the proper means for doing this is to place them at a comparatively early period of life in a position which will concentrate their attention on the requirements of the judicial line as a profession, will hold out inducements to them to perfect themselves in that profession by study, and will afford them a practical training for it.

9. This can only be done by disconnecting the future Judge from the distraction of executive duties; and while securing him against the chance of being called on, in after-life, to discharge duties which shall require executive qualifications, he should be given distinctly to understand that he must look for advancement in the judicial line, and in that

alone. There are other obvious reasons why an officer, who has once reached a high position in the judicial line, should be precluded from looking for advancement beyond that line.

10. Nor is it only for the improvement of the judicial service that this separation is called for. The administration on the executive side has also become more scientific and exact, and the work of the Executive Officers is multiplying and extending upon every side. In some of the larger districts the labor imposed by the union in one officer of executive and judicial administration is so great, as to diminish the efficiency of the former as well as of the latter; and in those smaller districts in which there is no second officer, the want of one has been long most urgently felt.

* * * *

15. Of Joint-Magistrates, there are twenty-two of the 1st grade at Rs. 10,800, and eleven of the second grade at Rs. 8,400. The latter, however, are rather steps in promotion than Joint-Magistrates proper, and only the twenty-two of the first grade are attached to particular districts. There are therefore fourteen districts in which there are no Joint-Magistracies, but in some of these, as observed above, the want of an officer of this class has long been most pressingly felt, and whenever it is found possible, the services of an experienced Assistant are given. This officer, therefore, occupies the place and performs the functions of the Joint-Magistrate as described above, more or less exactly according as the Collector-Magistrate finds time and inclination for judicial work.

16. Besides the above who form the regular staff of a district, there are in each district—

(1) A District Superintendent of Police, and, in some districts, one or two Assistant Superintendents, who under the Magistrate carry on the Police work of the district;

(2) Assistant and Deputy Magistrates, some in charge of sub-divisions who are charged with both executive and judicial work, some not in charge of sub-divisions who are

used for executive or for judicial duties, or for both, according to the discretion of the Collector-Magistrate.

17. Excluding these last, of whom only the Assistant Magistrates are members of the Covenanted Service, and are eligible for the higher appointments of the district, we may state the staff in each district to be composed of—

(1) The Judge, resident or non-resident, whose functions are wholly judicial ;

(2) The Collector-Magistrate, who, though nominally both judicial and executive, is in the larger districts almost wholly executive, and in the minor districts very much more executive than judicial ;

(3) The Joint-Magistrate in the larger districts is almost wholly judicial, and an Assistant Magistrate in the smaller districts, who, though to a greater extent than the Joint-Magistrate proper available for executive work, is also mostly a judicial officer.

18. Accepting it, as determined, that a separate judicial service is to be created which will ensure for those who are eventually to become Judges a continuous training in judicial work, the problem before the Government is how best to alter the present constitution of the Civil Service so as to effect this object? The conditions under which this question should apparently be determined are these : *first*, the change should be effected with the least possible disturbance of existing administrative arrangements ; *secondly*, it should involve as little change as possible in the prospects as regards pay and position of the members of the Civil Service.

19. The first of these conditions almost necessarily leads to the following plan, which has the advantage of being both very simple in itself and of effectually fulfilling the required conditions. It is to carry to completion the tendency which, as shown above, has displayed itself of late years to confine the Joint-Magistrate to judicial duties, leaving the executive to another officer, who is represented by the present Magistrate-Collector. The former officer, who might be called Assistant

Judge, would under the proposed arrangement be unavailable for executive work, and to him would fall the chief share of the criminal judicial work of the district. The Assistant Judges and the Judges would form a distinct judicial branch, the promotion being made direct from the former post to the latter.

20. This re-organisation will not make it necessary to increase the number of Judges. Those districts which at present have non-resident Judges will continue to be attached, in respect of the Judge's jurisdiction, to an adjacent district. Of District Officers, also, the number requires no alteration, as there is already one to each district. But the number of Joint-Magistrates is not sufficient to give one Assistant Judge to each district, and the Lieutenant-Governor proposes therefore to complete the number by attaching to the minor districts the at present unattached Joint-Magistracies (eleven in number), and by creating three new ones.

21. It is no part of the scheme, nor is it advisable in itself, that the separation of executive and judicial functions should be carried out in the grades below the Joint-Magistrates. While filling these lower appointments, whether in a civil station, or as a Sub-Divisional Officer, the covenanted civil servant is learning his work, and gaining a knowledge of the people, of the law, and of the system of administration. It is clearly to his advantage that this education should be a general one, and at the same time it would not be possible in these appointments to make a division into executive and judicial without incurring considerable expenditure, and without making violent changes in the present arrangements and probably also in the law. But when an Assistant Magistrate has reached that period of service where, under present arrangements, he is appointed to fill a Joint-Magistracy, he may reasonably be called on to decide between the judicial line and the executive line, and the Government will also have the means of determining for which branch he is best suited.

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32. It has been the object of the Lieutenant-Governor in

the present proposition to avoid as far as possible all necessity for legislation.

33. It does not appear to be necessary, as a part of the new arrangement, to deprive the District Officer of all judicial power. The Lieutenant-Governor is strongly impressed with the inexpediency of doing so. The point is discussed by some of those who have written on the subject, and effectively by Lord Ulick Browne and Mr. Westland.

* * * *

35. It will be in the recollection of the Government of India that Sir Frederick Halliday, in his Police minute, laid great stress on this point, and his views are so forcibly expressed that it seems to the Lieutenant-Governor right that an extract from his minute should be appended to this report. It is possible that Sir Frederick Halliday, after the experience of the fourteen years which have elapsed since his minute was written, might have considerably modified his objection to the separation of the executive part of the service from the judicial, but in regard to summary enquiries and local judicial investigations by a Magistrate, his views are in accordance with those of the present Lieutenant-Governor.

* * * *

39. The Assistant Judge, deprived of all executive work, will no doubt be able to devote one day or two in each week to civil judicial work. It is in fact one of the objects of the proposed separation that in civil as well as in criminal matters the future Judge should have an opportunity of acquiring experience. Legislation is, however, not necessary for this purpose, as it will be sufficient to vest the Assistant Judge with the powers of a Moonsiff, or, when he has gained sufficient experience, with those of a Subordinate Judge. In the former case, his appeals would go to the District Judge, and in the latter, come under the immediate cognizance of the High Court. The jurisdiction of the Judge is not in this proposition in any way affected; nor is any change proposed in respect of the Assistant Magistrates or Deputy Magistrates.

These proposals, as already stated, have for their object the commencement of a complete separation between the Criminal, Judicial and Executive branches, and the speedy formation of an exclusively Judicial branch, both Criminal and Civil, with the smallest possible degree of immediate change, without recourse to legislation, and with the least avoidable increase of cost to the State.

The present interests of individuals in the higher ranks of the service will, as noted above, stand in the way of the immediate general adoption of the scheme. But a fair start can be made at once, and a few years will see it completely carried out. Among the younger members of the service, the inclination towards the executive line seems greatly preponderant, and it will probably be found that the number offering themselves for the judicial branch of the service will be insufficient, and the Government will have to force others into it. This course, however, would be adopted only when necessary. If the Government should see reason to think an officer decidedly more fitted for the judicial branch than for the other, of course personal considerations would not be attended to ; but apart, from this, both now and in subsequent nominations, there seems no reason why the second, or the third, or the fourth, or even the tenth for nomination should not be admitted to the judicial branch, if his seniors should prefer to wait for vacancies in the other branch.

The Lieutenant-Governor would notice by anticipation an objection which may perhaps be urged to the scheme now proposed, namely, that junior men on Rs. 900 and senior men on Rs. 2,500 a month will be at the same time performing the same functions of district officer. Without altogether altering the present system of district administration, which presents two classes of judicial work, but only one of executive, it is impossible to avoid this objection. The creation of a subsidiary executive appointment in all, or in most districts, would cost three lacs of rupees. The Lieutenant-Governor, however, is of opinion that there is not much weight in the

objection. The officers in the higher salaries will be senior in service and experience, and will naturally be selected for the heavier districts and the more arduous posts, the responsibilities of which will bear some proportion to their salaries, while those of the lower grades will be placed in light districts, for the administration of which they will be perfectly competent.

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## IV.

### *Opinion of Mr. Chapman, C. S.*

*From R. B. Chapman, Esq., Offg. Commissioner of the Presidency Division to the Secretary to the Government of Bengal, Judicial Department,—(No. 119, dated Calcutta, the 26th May, 1868.)*

In replying to Government order No. 2515, dated 1st May, I respectfully refer the Government to my No. 16Ct., dated 14th February, 1867, in which I discussed, at some length, a question closely analogous to that upon which my opinion is now asked.

2. There can, I think, bo no doubt whatever that the principle of the division of labour is at least as valuable and as important in its application to intellectual work, as in its application to mechanical work. I take it to be quite indisputable that if, of a given number of officers, some are employed on purely judicial duties, and the rest on purely executive duties, the work in both departments is likely to be very materially better done than if each be employed indiscriminately upon both classes of duties.

3. It is, I should suppose, quite unnecessary for me to discuss the abstract question whether there is such a difference between judicial and executive work as to make a differential training desirable. I imagine that no one is likely to deny that it is so.

4. The question now for decision, as I understand it, is

simply how far it is possible or expedient to carry the accepted theory into practice.

5. I showed in my former letter that we have made some progress in the matter in Bengal, that executive and judicial duties are, except at sub-divisions, much less jumbled together than in the non-regulation districts, and that for the administration of criminal justice our officers have as good a practical training as the Judges in England, and probably a better. For a Judge in England has seldom had much practice in criminal law till he takes his seat upon the Bench.

6. But I said then and I repeat now, that I think it most desirable to do what we can to carry out further the division of the judicial from the executive, and to commence it as low down as possible.

7. That it is in every respect proper that an officer once on the Bench should be debarred from all future advancement in the executive service, I consider too clear to require demonstration. Only so can the Bench be safely secured from reproach and distrust. No motive but the desire to do his duty righteously in so exalted an office must be *possible* to a Judge who reaches the top of his profession.

8. I scarcely know whether I can answer either the first or the second question contained in your letter so fully as may be expected of me, or indeed to any practical purpose at all, without considering whether, and how, it is possible to carry out the proposed separation of duties.

9. It would, however, probably be only a waste of my time, and of that of the Government, if I were to attempt to go into details on such a question, which would, I think, be much better dealt with by some consultative body; it is so easy to blunder in attempting to draw out a scheme of the kind.

10. Moreover, without some intimation of the purposes of the Government upon such a point,—for instance, as to whether the Civil Service shall take over any share in the administration of civil justice,—it would not be very easy to draw out any such scheme.

11. I will therefore say only that I think it will probably not be practicable to base the separation lower down than the stage at which an assistant quits the sub-divisional life. The duties now performed by the following officers should be classified in two lists, Judges,—Magistrates and Collectors,—Joint-Magistrates and Deputy Collectors, Small Cause Court Judges —and Registrars. And probably some small share in the administration of civil justice might be taken by the judicial department branch to be formed. Some of the uncovenanted Judges now employed in purely civil duties are taking a corresponding share in criminal work.

12. It would be essential, I think, to arrange, as far as possible that the emoluments of the two classes should be fairly equal, and this might be done by a classification, such as you have yourself I know sketched out, but into such details I do not enter.

13. I would therefore answer your question by saying that, in my opinion, it *is* expedient that a judicial branch of the Civil Service should be formed to exercise purely judicial functions, and that I know no insuperable difficulties in the way of the adoption of the plan.

14. I would not begin the distinctions lower down that I have proposed. It would probably be inconvenient in various ways to do so; and I do not think it would be desirable to forego the preliminary training in the knowledge of men and things that assistants get; a training as useful and as indispensable, I think, in one branch as the other.

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## V.

### *Opinion of Mr. Monro, C. S.*

*From J. Monro, Esq., Officiating Collector and Magistrate of Jessore, to the Under-Secretary to the Government of Bengal,—(No. 131, dated Jessore, the 27th May, 1868.)*

I have the honour to acknowledge the receipt of your letter No. 2515 of 1st instant, and to reply as follows:—

2. The separation of the judicial from the executive branch of the service has been much discussed of late years, and with the introduction of the new Criminal Codes and the Police Acts, a *quasi*-separation on the criminal side was effected. In reality the separation which was then effected was little more than nominal, and practically the Magistrate, as head of the police, and as chief executive officer of the district, is very much in the same position, executively and judicially looked at, as he was when he had the police directly under him.

3. With the exception of this nominal change on the criminal side, no separation of executive from judicial duties has been effected.

4. There can be little doubt that the present training of our officers, both executively and judicially considered, is most imperfect and defective ; it is an illustration of the doctrine of *latent status*, and consists of a system of learning and unlearning which has an injurious effect on both branches of the service. An assistant, after passing an examination in civil law at home, comes out to India, and on being posted to a district, finds that he has no chance of making any use of his knowledge of civil law until he becomes a Judge after 15 years' service ; he then begins to undergo a course of executive training, which lasts for a year or two. This period passed, he finds himself at a sub-division, and expected to exercise both judicial powers and perform executive duties. His next step of promotion is that of Joint-Magistrate of district, where he at once becomes a purely judicial officer, his executive knowledge being kept latent and held in reserve till his advancement to the charge of a district, when the executive experience of the sub-division is called into play again, and the Magistrate and Collector is expected to control executively a large tract of the country, both as a criminal and fiscal officer, and at the same time fit himself by practice in criminal trials and revenue appeals for an efficient performance of the functions of a Judge. Promoted to a Judgeship, he begins again the study and the practice of the civil law, which, except at fitful intervals in his

career, hitherto he has had no opportunity of administering or seeing administered. For the performance of the duties of a Sessions Judge he has had some training while Joint-Magistrate, although the worth of the said training may be considerably diminished while kept latent during several years of executive work as Magistrate and Collector ; but as Civil Judge, the training has been absolutely *nil*, unless it is maintained that the slight experience gained while deciding rent suits as a sub-divisional officer, and as a Covenanted Deputy Collector serves as a training. The consequence is that the Judge, after 15 or 17 years' service, is called upon to administer an almost entirely strange system of law, to enter upon and decide questions affecting the rights of the inhabitants of a large tract of country, to hear appeals from experienced subordinate officers on these questions, without any previous acquaintance, practical or even theoretical, with the law which he is suddenly called on to administer.

5. Both theoretically and practically, such a system as is above described must work, and does work imperfectly, not only as regards the judicial, but also as regards the executive branch of the service. If an officer has a judicial turn of mind, we not only give him for nearly two-thirds of his service no field, except in the criminal side, for cultivating this judicial aptitude, but by hampering him with a variety of executive duties render any attempt at gaining judicial experience by study or practice impossible. If an officer, again, has no such judicial inclinations, he is, with as little experience as the judicially inclined officer, and less aptitude, promoted to the bench. Under such circumstances, it is hardly to be wondered at that the judicial branch of the service is not so strong either in theory or practice as it ought to be. If we insist upon the presence of some special training as a qualification in members of the subordinate judicial line, I do not see why we should inconsistently persevere in a system for the higher grades of the service, in which the absence of any training is the most conspicuous element. It would ill become me to throw discredit

on the members of the covenanted service who hold the higher judicial appointments, but I do not think that there can be a doubt that if, instead of judicial life being commenced in a Judgeship, promotion to that office simply involved a continuation of practice in laws with which the officer had been already practically familiar, the efficiency of the judicial staff would be very materially increased.

6. I would not recommend the constitution of a separate judicial branch solely on the ground of increased judicial efficiency in the members of that part of the service, but I would support the recommendation by urging the present great need, and the prospect which the separation would afford of the hands of executive officers being strengthened.

7. We have not yet nearly reached that point where the executive, if I may say so, manages itself: when by self-government among the people, the work of a Government official is so lightened that supervision alone is required. The officials for a long time to come must work up the minutest details in every department of work ; and to do this they must have time, which at present they have not. Their time is spent between judicial and executive work, and the claims of each of their masters is so pressingly urged that the work of both, if done at all, is done hurriedly and superficially, and their duties to the people, the careful and honest performance of which alone gives to an administration a foundation other than the fear or ignorance of the governed, are habitually and necessarily neglected. The consequence is that co-operation between those governing and those governed hardly exists. The officers do not know the people, and the people do not know the officers, and inefficient administration is the result.

8. Were the two branches of the service separated, however, there would be no excuse for officers in both departments not attending to their duties, and we should have a really strong executive body of officers well acquainted with the people and with their circumstances, habits, and pursuits, able to speak from personal experience, instead of at second hand,

with leisure to devote their energies to the people in other ways than by deciding their cases, instead of the imperfectly informed and necessarily uninfluential staff which we have at present.

9. I look upon the efficiency of the executive as of more importance than the efficiency of the judicial branch of the service, and until the judicial duties now performed in conjunction with executive work are entrusted to a set of officers unburdened with any but judicial functions, it is in my humble opinion impossible to have a really strong and useful executive body.

10. I say nothing of the point that the improvement which has taken place and is taking place in the attainments of members of the mofussil bar should be accompanied by similar advancement on the part of those who sit on the bench, save that, unless the present system of combining executive with judicial training be changed, it is hardly fair to officers to expect that such advancements will take place.

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## VI.

*Opinion of Mr. (now Sir James) Westland, C. S.*

*From J. Westland, Esq., late Officiating Magistrate of Nuddea, to the Under-Secretary to the Government of Bengal, —(No. 439, dated Kishnaghur, 22nd July, 1868.)*

With reference to your No. 2515, dated 1st May, 1868, about the separation of a judicial branch of the service, I have the honour to offer the following as my opinion :

2. The separation of the members of the service into two distinct branches, one of which shall be charged with the executive and administrative work, and the other with those duties which are purely judicial, may be desirable on account of the great accumulation of work on either side but it does not seem to be desirable upon any other ground. It may be the case that a large amount of executive, or of judicial work might be performed by an officer who has no other calls upon his atten-

tion, but it is quite a different question whether a larger amount of work being done, the administration would be more perfect. Magistrates and Collectors in Bengal are not abstract impersonations, were instruments through which the law is carried into force, but they are persons whose personal character and *prestige* have a great influence in the Government of a district. The *prestige* is greatly increased when the control of both judicial and of executive work centres in one officer as Magistrate and Collector, and every officer exercises greater influence when he is regarded both as the person who is to direct what is to be done, and the authority to whom matters in dispute are to be referred. It may seem well in principle to separate the two branches of one's work, but then it is not by principles or by laws that this country is mostly administered, but by men, and therefore it seems to me inadvisable, on the ground of mere principle, to render the men less able to sustain the position, or perform the duties allotted to them.

3. The objections to the present system are mostly of this nature : It is said, for example, to be wrong that the same officer should control the police in the investigation of an offence, and then sit judicially to determine whether the man he has accused is really the guilty one or not. But then the people of this country don't think so, but regard the investigation of a crime and the trial of an offender as all one matter, which may properly be done by one officer. They think it perfectly natural that the knowledge gained in one capacity should assist him in his duties performed in the other capacity, and if the system which suits the ideas of the people work well, I don't see why it should be changed, simply because it does not consort with English ideas.

4. It seems to me that, so far as such matters go, we secure a just exercise of both functions, by causing them to be controlled by separate individuals (for example the Judge on one side and the Commissioner on the other) without also ordering that they should be exercised *ab initio* by different individuals.

5. One chief argument put forward in favour of changing the system is its supposed influence in training up better Judges, but I confess I cannot subscribe to the argument that a Collector in his executive capacity acquires no education fitting him for a judgeship, and that he would be a better Judge if he were trained to Judicial habits all along. The extreme consequence of this argument would be that the best Judge of all would be a man who, having received no other education, has been trying *mar-pcet* cases from his infancy upwards. It seems to me that the probability lies in the other direction, and that coming as most of us do as strangers to the country, its habits and customs, we require that general education regarding the manners and men of the country, which can only be given by exercising executive functions before we are qualified to sit in judgment on matters concerning them.

6. The purely judicial mind, which is the presumed product of the proposed system, is not, to my thinking, an enviable state of mind. It leads far too frequently to the postponement of justice to law, an error into which an officer, whose mind has received enlargement from his training in executive work, is not nearly so likely to be led.

7. For myself, therefore, I am opposed to the separation of the service into totally distinct branches. If any remedy is required for the present state of matters ; if more of the judicial part of training is necessary, or if the judicial work is interfered with by the executive, there are many other ways of remedying it than by depriving each branch of the experience to be gained and the personal influence to be acquired by the exercise of the functions allotted to the other.

8 The second question proposed in the letter as to the probability of its application in principle to the present service, I cannot see any objection, on the score of principle, but it would be impossible for me to express any opinion upon this part of the subject, without having some idea of the scheme under which the separation would be effected.

## VII.

### *Opinion of Mr. Cockerell, C. S.*

*From F. R. Cockerell, Esq., to the Under-Secretary to the Government of Bengal,—(dated Simla, the 25th July, 1868.)*

In reply to your letter, No. 2515, dated the 1st of May, 1868, calling upon me for an expression of opinion—(1st) as to whether it is expedient that a distinct judicial branch of the Civil Service should be formed, the members of which should be trained specially for the duties of the Bench, and should not look for advancement beyond the sphere of those duties ; and (2nd) as to the difficulty, if any, in accepting the principle of such a change absolutely with regard to the Indian Civil Service, I have the honour to state that in regard to the first question, I am decidedly of opinion, not merely that the formation of a distinct judicial branch of the service is desirable, but that the progress of events points to such a change as likely soon to be absolutely essential to such an administration of justice as is calculated to command the respect of the people.

2. I believe that in a great number of cases at least the sense of his unfitness, through want of experience of judicial business under the present system, for the efficient discharge of the duties of the office, is felt by no one more strongly than the newly-appointed Judge himself ; and that the appointment is not unfrequently accepted with much diffidence and reluctance.

3. Nevertheless, the progressive arrangement of the emoluments pertaining to the several offices held exclusively by members of the Civil Service is at present such as to render the acceptance of a Judgeship as a necessary intermediate step in promotion to the higher executive appointments almost imperative ; unless the Civil Servant to whom it is offered is prepared to submit to a sacrifice, not merely of present pecuniary interest, but possibly also of all prospects of personal advancement.

4. I think that this unfitness, owing to the fact of the previous career of the Civil Servant affording little or no training

for judicial duties, has been always more or less felt, but it has been increasingly so since the union of the offices of Magistrate and Collector in 1859. Previous to that period, the Magistrate had, in his department, the means and opportunity of acquiring some considerable experience of judicial functions, and in fact generally did acquire such experience ; he subsequently became Collector, and in that capacity was not only much employed in work of a *quasi* civil-judicial character such as was calculated to familiarize him with the recording and sifting of evidence, and the consideration and investigation of questions of the application of the law, but as the duties of Collectors were in most districts neither very onerous nor absorbing, had usually leisure for the study of the law and partial preparation for the duties of the Judge's office to which he would be eventually appointed.

5. Very different is the case, I think, under the present system. In most districts the executive duties of the double office of Magistrate and Collector so completely absorb the time and attention of the incumbent, that he is absolutely unable to take upon himself any material share of the judicial work appertaining to the two offices. Much less has he any leisure time to apply, were he willing, to his own better qualification for the Judge's office.

6. But the culmination, present or approaching, of the defects of the present system is due perhaps more to external causes. During the past 10 years the procedure of our courts has vastly improved, and the administration of justice has become, and is still becoming, increasingly scientific. This is due no doubt in great measure to more complete legislation, but it is also due—my remarks having reference, of course, to the provinces subject to the control of His Honour the Lieutenant-Governor—to the great progress which has taken place in the education of all but the lowest classes of the people during this period, and in the legal education of those persons who are employed in the conduct of suits in our courts, and who constitute the Mofussil Bar.

7. Formerly, when the procedure law was ill-defined, the practice of adducing and admitting all sorts of irrelevant evidence wasgeneral and the legal agents of the parties to the suits were uninstructed and ignorant, the indefinite character of the suits submitted to the Judge's decision, and the absence of all technicalities, gave such a latitude to the exercise of general ability and common-sense as compensated for the Judge's want of legal training in the proper sifting of evidence, and the exposition of points of law, and his decision carried weight with the pleaders of his court and their clients.

8. Now all this is changed, the procedure of the courts is clear, the issues submitted to their judgment in any case are well-defined, the pleaders or agents employed by the parties to a suit in their application of legal principles evince no small intelligence and acquaintance with the subject, and we seem to be in danger of arriving at a state of things which must be prejudicial to the respect which the administration of justice in our principal civil and criminal courts should command *viz.*, the spectacle of a Mofussil Bar in advance of the Bench in experience and requirements of the law, and a practical knowledge and understanding of the application of its principles.

9. There is another point also in connection with this question worthy of consideration. Whilst the class from which the Judges of the principal courts are taken have even less opportunity than formerly of acquiring experience of judicial duties and practical knowledge of the application of the law in judicial proceedings, the officers who preside over the subordinate civil courts are as a general rule very much in advance of their predecessors in the knowledge of law and intelligence, and discrimination in the application of its principles, which they bring to bear on the adjudication of suits. And now that the position and prospects of the subordinate judicial service are much improved, and its members are recruited almost exclusively from the class who have attained some proficiency in the study of law, this superiority is likely to become more and more noticeable.

10. In these circumstances, if the present system of transferring officers, who have been for several years employed practically in an almost exclusively executive capacity, and are thus wanting in judicial experience, to the Bench of the principal district civil court be maintained, the knowledge of law and capacity for adjudication of causes possessed by the newly-appointed Judges will not improbably bear unfavourable comparison with the qualifications of the Subordinate Judges, and the result must be eventually such a loss of prestige and confidence in the public estimation of the principal district courts as will impair their efficiency for the administration of justice.

11. It will be deemed an anomaly, moreover, that courts presided over by Judges whose antecedents as regards judicial experience and legal training afford less grounds of assurance of their capacity to adjudicate on the merits of any case than those of the Subordinate Judges, should nevertheless be the constituted principal district appellate courts by which all the decisions and proceedings of those Judges are subject to revision, and that while the constitution of the chief courts of appeal in this country has been so remodelled as to secure for the supervision of the administration of justice a combination of the best attainable local learning and intelligent local experience, and so much has been done for improving the character of the courts of first instance, no effort should be made to provide for the efficiency of the intermediate appellate courts, progressing *pari passu* with that of the courts above and below it.

12. As regards the second question, the first question that presents itself is the existing distribution of office emoluments above adverted to. This obstacle, however, to the maintenance of a distinct judicial branch should of course be easily surmounted by a revision of salaries attached to the different offices ; and, indeed, I am of opinion, that apart from all considerations of the present question, the necessity, in justice and fairness to the district officers of the Lower Provinces of Bengal, of some modification of existing arrangements as regards their emoluments must sooner or later have forced itself upon

the Government, for the position in this respect of the Magistrate and Collector in Lower Bengal is one of comparative hardship and injustice.

13. It cannot, I think, be maintained that the duties and responsibilities devolving on those officers are in any degree less onerous than those of the Magistrates and Collectors of districts in the other regulation provinces; yet, whilst in Bombay and Madras Presidencies the salary of the chief executive officer of the district is equal to, and in the N.-W. Provinces but little less than that of the Judge, in about ⅔rds of the districts of the Lower Provinces of Bengal the difference between the emoluments of these offices is no less than 25 per cent., and in the remaining districts the percentage of distinction is even greater.

14. Before, therefore, the principle of the maintenance of a distinct branch can be adopted, this inequality must be got rid of, and the chief executive officer placed as nearly as possible on a par, as regards salary, with the chief judicial officer of the district in the Lower Provinces of Bengal, as he already is in all the other regulation provinces of the Empire.

15. This point is, in my opinion, one of paramount importance, for I hold the chief executive officer of the district to be the most important element in our administrative system. He is the purveyor of the information upon which the ultimate action of the Government is taken on almost every question that arises, and is the agent through whom almost every civil reform designed for the amelioration of the people of this country, is carried into operation. It depends in great measure, therefore, on his individual ability, energy and discrimination whether the information furnished is founded on fact or the reverse, and whether the reforms undertaken are fairly successful or otherwise.

16. In applying the principle of the creation and maintenance of distinct branches to the Indian Civil Service, therefore, I think that due regard should be had to the importance of the position of the chief executive officer of the district, and that it

is politically expedient so to arrange the distribution of emoluments and prospects of personal advancement in either branch as to give a preferential encouragement to the executive.

17. An enactment is likely soon to be passed by which provision is made for assigning to natives of this country a more important share than they have hitherto enjoyed in the administration of public affairs, or, in other words, for rendering them eligible for posts hitherto occupied exclusively by members of the Covenanted Civil Service. It may not be out of place here, therefore, in reference to and in support of the suggestion made in the preceding paragraph of this letter, to state my conviction that the post of chief executive officer of the district and the highest executive office should be absolutely reserved for the members of the Covenanted Service. I am of opinion that the time for the employment of natives of this country in such a capacity is yet far distant, and that their appointment to any of those offices would be fraught with grave political dangers. I think, on the other hand, that natives of proved capacity and qualified by their antecedent circumstances for such advancement, may not unobjectionally be appointed to the highest local judicial offices, as they are already eligible, under certain restrictions, for appointment to the highest Courts of Appeal in this country ; as legal education progresses, it is probable that all ranks of the judicial service will from time to time be ably and efficiently recruited from this source and it is on this view, I think desirable to extend greater encouragement, as above suggested, to the adoption of the executive line, and thereby induce the abler members of the Covenanted Service to elect and qualify themselves for employment in that line.

18. The main difficulty, as it seems to me, that attaches to this question, is the determination of the mode of selection for regulating the assignment of officers *ab initio* to either branch of the service. The question is whether the adoption of either line should be left to the election of the individual members of the service, subject to such restrictions on the exercise of this right

as the exigencies of the public service might impose, or whether the selection should be made by the Government.

19. The scheme which I would suggest embraces both these modes of dealing with the matter. I would accord to a certain number of the members of the Civil Service, who had obtained the greatest credit in passing periodical Mofussil examinations, the right of election, and I would fill up remaining vacancies, in either line, by selections to be made by the Government. In this way any undue proportion of candidature for either branch, resulting from the exercise of the power of election, could be balanced by the alternative mode of recruiting the different branches, and an opportunity should be also thereby secured by attaching any officer to either branch, for which they had shewn special qualifications, but which they might be incompetent to elect, by reason of their not having acquitted themselves with sufficient credit in the Mofussil examinations.

20. I think that the appropriation of either of the distinct branches of the service, whether by election or otherwise, should not take place until the Civil Servant has been employed in the Mofussil for at least four years, and then only when he has passed during that period all the prescribed examinations. Up to that time he should serve in a subordinate capacity in both departments, his time being as nearly as possible evenly divided between the duties of either branch, so as to give him an equal opportunity of acquiring experience of either, and of shewing for which he is best qualified to be permanently attached.

21. The local appointments pertaining to the two distinct branches might be evenly distributed as follows :—

*Executive Branch* :

Commissioner.
Deputy Commissioner.
Sobordinate Deputy Commissioner and District Superintendent of Police.

*Judicial Branch* :

Judge of Circuit.

District Judge.

Magistrate and Assistant Judge.

22. In the foregoing distribution of officers, I have substituted in the executive branch Deputy Commissioner for Collector, as being a more appropriate designation, seeing that the officer so designated will discharge all the executive functions of the Magistrate, as well as the duties connected with the administration of the district. The Magistrate, who is placed among *judicial* officers in the above proposed re-arrangement would have magisterial jurisdiction in that capacity only ; he would also be employed in the adjudication of civil cases as assistant to the District Judge. The chief subordinate officer to the Deputy Commissioner in the executive branch might advantageously be placed in charge of the Police, and abolishing the useless office of Deputy Inspector-General. The District Superintendents, so selected would, as a rule, be found more familiar with the vernacular and customs and habits of the people, and the general control of the Police ceasing to be divided, as at present, would necessarily be more efficient.

23. The creation of the new office of Judge of Circuit is suggested on the proposed re-organisation of departments. The office would correspond in a measure with that of Commissioner in the other branch ; the number of such Judges required would be very few, in no case would more than one such Judge for a division be necessary, in divisions like Chittagong and Cuttack, as now constituted, no such officer probably would be wanted ; and for the Nuddea and Burdwan Divisions, as well as perhaps Patna and Bhaugulpore, having regard to the facility of locomotion, one Circuit Judge for two divisions might suffice. The object of the creation of such an office would be to provide for the trial of important cases by a bench of two Judges, the Circuit Judge being associated with the district Judges, a provision which is undoubtedly very much needed for the improvement of the administration of justice.

24. It will be seen that this plan of revision of offices, with a view to separating and maintaining distinct the executive and judicial branches, involves scarcely any substantial changes of existing arrangements. The Deputy Commissioner will correspond as nearly as possible with the present Magistrate and Collector, with this advantage, that, shorn of all responsibility for judicial administration, he will be better able to discharge with efficiency his generally onerous executive functions, whilst the position of a Magistrate and Assistant Judge will be practically but little different from that of the existing Joint-Magistrate and Deputy Collector. The most material proposed change of existing arrangements is that which relates to the office of District Superintendent of Police, but it is one which, for the reasons stated above, will, I think, be found to work well.

*P. S.*—My remarks above, as to the expediency of forming a distinct judicial branch, have been confined to the consideration of the defects resulting from the want of proper training for the Bench, which is the necessary consequence of the present system. I omitted to state the other argument against the maintenance of that system, *viz.*, that the combination of judicial and executive functions in the same person, *e.g.*, the Magistrate and Collector, is theoretically open to objection, and in practice has not always worked satisfactorily. The Collector may as Magistrate try cases, the prosecution of which has been instituted by himself, and there are instances on record in which this power has been indiscreetly availed of. It is obviously a position which is calculated to suggest doubts in the minds of the people, in regard to the strict impartiality and independence of the judgment of the tribunal so constituted nor is the case much improved in this point of view, when the Collector's prosecution is instituted before his subordinate, the Joint-Magistrate, who has to look in great measure to the approval of his immediate official superior for his own personal advancement.

I have no hesitation in saying that a service which has furnished able administrators in every department of the Government will not be wanting in men (as even under the present system individual instances prove) who will be in every sense qualified for the functions of the Bench, when proper facilities, hitherto wanting, for attaining the habits and experience of Judges are supplied. They are men of education, of respectable rank in society, and would have, under the proposed arrangements, all the stimulants to fit themselves for a right discharge of their duties, which emulation in a separate and distinct branch of the Civil Service and the ambition of a seat in the highest Court of Judicature in this country could give.

5. The establishment of the High Court bringing Civilians in immediate connection in judicial duties with trained Judges of experience and ability is another necessity for the proposed arrangements. Except in a very few instances, a Civil Servant, under present circumstances, has no legal training for judicial work till he is appointed a District Judge. It is probable that every officer, when called upon first to undertake such duties alone, is embarassed with the utter novelty and heavy responsibility of his position. The embarrassment is increased by the certainty that amidst all the multiplicity of duties which he is called upon to perform, single-handed, there is neither leisure nor opportunity for the acquisition of that special knowledge which the situation requires. The attempts to study books, especially in such a science as Law, amid all the distractions of incessant daily avocations, are made by few, and even to these few there must be always a consciousness that the attempt is made too late in life, and that ability and success as a Judge cannot be attained by the labours and learning of others. They must create their own powers and acquire with toil the faculty of judging by the exercise of their own minds, and this education only commences at a time when, for the proper discharge of the work, it should have been all but finished. It is not to be wondered at that, under such a system, any present vacancies in the High Court are with difficulty replaced : the longest

apprenticeship in the department, as now constituted, will not make a man fit to hold his own among colleagues, who, whether success or failure may have been the result of their profession as advocates, have this advantage that they have devoted to it the best years of their life, and are competent by this training to perform its duties efficiently. It seems to me that the advance in ideas of public policy which has made the High Court a necessity for India, makes it also a necessity that the Civilian element in it should be worthily represented.

6. I would point again to the fact that the reforms and improvements in our laws, and the association of the Natives themselves to some extent in their administration, have undoubtedly had the effect of enlarging the knowledge of the people in all legal subjects, and it is certain also that increase in the value of landed property, and the accumulation of wealth, have given rise to many questions of civil right which demand the assistance of lawyers for their solution. The high attainments, too, of very many of the Native Judges, and especially the advancing efficiency of the Native Bar, require a corresponding progress in knowledge and experience in European Judges, upon whom devolve the supervision and control of all the Subordinate Courts, presided over in most cases by Native Judges, and the authority and regularity requisite for the efficient administration of the law in their own. The position of the Native Bar in most mofussil Courts is now a very different one from what it was a very few years ago, and every year improves their position. They have great facilities now for acquiring a legal education, and show a special aptitude and predilection for that profession. They are admitted to Pleaderships in the different Courts after a careful examination as to their professional and moral qualifications, and they are acquiring more and more every day the spirit, intelligence and independence which are essential for the right discharge of their calling. To train them highly for these duties, and to place them in a position where they can watch the conduct of the Judge during a trial, protest against his irregular orders,

and convict him of errors in law and procedure, is not only derogatory to the character of the Bench, but is subversive of all that influence and authority which the European Judge (who is not merely the adjudicator of suits to a certain extent, but the superintendent of all judicial process throughout the zillah,) should invariably enjoy. The Natives, I believe, have more confidence in the uprightness and impartiality of European Judges than of Judges selected from their own people, but this distinction is chiefly to be ascribed to the unequal position in which the Natives are placed in all official situations compared with Europeans, and in none more than in the Courts of Justice. But I do not think, as regards legal acumen or judicial ability, they have any preference for the Zillah Court, and still as the highest appellate authority in the district, the Judge who does not inspire the community with a sense of his superiority over his subordinates in all that requires to make a Judge, is not, in my judgment, in his proper position.

7. The subject matter of this reference is, I believe, one which has been under consideration for some time, both in the public press and in official correspondence ; the consequences of the proposed change have been not unfrequently discussed ; and we may trace in the tendency of appointments in the public service made by Government during late years, and the object of a great many legislative measures recently introduced, that the wish has been to establish indirectly a kind of distinction between the executive and judicial administrations of the country. The proposal, therefore, does not come before us as a sudden innovation, and the consideration, if it is approached with (as far as I can ascertain) a general acknowledgment that the recognition and confirmation of the existing practice is in its integrity, will tend to the benefit of the service and the good of the people.

8. The manner in which effect can be given to this proposal is not without its difficulties :

1st. Judicial appointments, as the service is at present constituted, are not sufficient in number to allow for the formation

of a distinct branch under that head, if promotion is to be maintained to such officers according to their standing.

9. Under existing arrangements, the judicial branch of the Civil Service in Bengal consists of—

| | | | |
|---|---|---|---|
| High Court Judges | ... | ... | 7 |
| Judges of Districts | ... | ... | 27 |
| Additional ditto | ... | ... | 6 |
| Legal Remembrancer | ... | ... | 1 |
| Registrar of the High Court | | ... | 1 |

to which may be added a few officers employed as Judges of Small Cause Courts. If we take fifty officers as comprising at present the full number required exclusively for purely judicial work, it will leave a very large preponderance in numbers for those otherwise employed. It would seem to be necessary, if a distinct branch is to be formed for judicial employment, the members of which are to be trained for the duties of the Bench, and who should not look for promotion beyond the sphere of those duties, to bring them more into equality as regards numbers. The necessity, too, for gradual advancement of all judicial officers, so that they should rise by degrees in that line of the service, is an object of importance as a part of the system of education for such duties. And it is also, of course, of paramount importance that the numbers comprising the judicial branch should be sufficiently large to ensure opportunities for selection by merit for the highest appointments. The present number of those judicially employed is altogether too limited for such a purpose.

10. The Civil Service in the lower Provinces of Bengal contains about 230 members. I would suggest that 100 members should be required for definite employment as judicial officers, leaving 130 for the executive administration. The incorporation into the judicial branch should be at the choice of each member of the service, subject to proof of fitness and qualifications for the office by strict examination; but not till every officer had been actually in employ for six years as a public servant. Such a restriction is necessary, both to secure

an acquaintance with the general duties which fall to the lot of civilians, and especially a practical and personal knowledge of the diversified interests and characteristics of the landed tenures of the country. A knowledge of these is an important acquisition for every public officer, and it is one which is best secured by an apprenticeship as an Assistant to the Magistrate and Collector of a district. The possession of such a knowledge is admittedly of great advantage to all who are called upon in this country to adjudicate cases in Civil Courts.

11. After a service of six years, a civilian should be called upon to elect the branch of the public service to which he would attach himself. Those who joined the judicial department should be nominated in the first instance as Assistants to the Judges. In this capacity they could be usefully employed in the preparation of cases : such for instance as the examination of plaints, issue of summons, determination of issues, and generally such preliminary duties as are required previous to the trial of a suit. They might fairly be empowered to try suits up to a certain value. but to undertake the trial of those only which were referred to them by the judge. In a great part of the miscellaneous business, which now occupies the time of a Judge to the postponement of more important duties, their aid would be of value. Many applications for certificates under Act XX, 1860, cases for execution of decrees and on occasions of importance the conduct of local enquiries might with advantage be entrusted to them, and give immense relief to the Judges. The adoption of such a proposal would give employment to some thirty officers. The extension of Small Cause Courts might legitimately be taken advantage of for the employment of the more experienced assistants, and in exceptional cases their deputation as Subordinate Judges might be to the public advantage. As they advanced in the service and gained experience and higher qualifications, they might be invested with powers as Sessions Judges, might be deputed on circuit to hear appeals, or try prisoners committed from sub-divisions at a distance, and I think, too, the time must

come when it will be found necessary, in very many mofussil cases, to have the advantage of two Judges in a Bench for more important suits.

12. I have not entered, in this imperfect sketch, into any of those details of the scheme which regard the pay and position of the officers who adopt the judicial branch. But if the principle of a separate judicial service be accepted, there will be, I should imagine, no difficulties on these points of an insuperable character. Excluding those members who are holding appointments in the Secretariat or other special appointments, the members of the judicial and executive branches of the Civil Service would be nearly equal, and promotion from retirements and other casualties would probably advance in each branch with equal steps.

13. For the preparation of members for the judicial office, I think in its commencement it must be left to the inclination and will of Civilians themselves. The knowledge that such a distinct branch of the service existed would probably lead many who had succeeded in their examinations at home to prepare themselves for it by a legal education and a call to the Bar, especially as under the new leave rules this position could (save in any rare instance) never be attained by a Civilian after he had begun his Indian career. When after a six years' probation an officer has elected to adopt the judicial line, the test of an examination would be a preliminary to his admission, and the subsequent gradual advance in that sphere of duty would daily make him more and more familiar with its special requirements. I would add as a suggestion, which seems to deserve consideration, that in his training for judicial avocations there would probably be no measure more effective, as a preparation for the duties of the Bench, than that the officers who first joined that line of the service should be called upon to undertake the conduct of all Government cases. Like other Advocates, they would learn their habits, and experience would thus be gained at the Bar, by which they would be in every way better qualified for the functions of the Bench.

14. I would wish to observe, in conclusion, that in the consideration of these questions, I have had regard only to the Civil Service under the Bengal Government.

## IX.

*Opinion of Mr. Campbell, C. S.*

*From C. H. Campbell, Esq., Officiating Commissioner of the Burdwan Division, to the Secretary to the Government of Bengal, Judicial Department,—(No. 126, dated Burdwan, the 27th July, 1868.)*

In reply to your No. 2515 of 1st May, I have the honour to state as follows :—

1. I am not in favour of a totally distinct branch of the Civil Service, for with reference to the small number of Civilians to the great variety of duties they are and may be called on to perform, and to the whole circumstances of the service as at present constituted (though changes are already looming in the not very distant future), I do not deem the measure to be practicable.

2. Nor if it were practicable, do I consider it to be altogether desirable.

3. I am of opinion, however, that certain modifications of the present system might very advantageously be introduced.

4. Executive work in this country is intimately connected with judicial work, and I think it is a great advantage that a Magistrate or a Collector, acting judicially as a Judge, should be thoroughly and practically familiar with many executive matters. Such as, for instance, the working of the police. Similarly, I think, an executive officer in India cannot be really efficient without a considerable amount of judicial experience. As an executive officer, I have felt and feel immense benefit from my judicial experience, and when I was a Judge, I felt equal benefit from my judicial experience. All officers conversant with the interior will, I am sure, bear me out in this.

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## X.

### *Opinion of Mr. Bell, C. S.*

*From H. Bell, Esq., Officiating Magistrate and Collector of Nuddea, to the Secretary to the Government of Bengal, Judicial Department,—(dated Kishnaghur, the 28th August, 1868.)*

I have the honour to acknowledge the receipt of your letter No. 2515 of the 1st of May, 1868, upon the establishment of a separate judicial branch of the Civil Service, and in reply to submit the following remarks :—

2. I think such separation is highly desirable, provided it does not take place at too early a period in a civilian's career. Until a man becomes a Joint-Magistrate, it is impossible for the Government to say whether he is strongest in the executive or judicial line. A man, too, cannot be a good judge unless he has some experience of the general administration of the country and of the manners and customs of the people. This experience can be best acquired in the varied duties which occupy a young civilian during the first years of his service. It is absolutely necessary, too, that a Judge should have a knowledge of criminal work ; and no training can give him so thorough an insight into this part of his duties as the practical knowledge he acquires as a sub-divisional officer and Joint-Magistrate. The proper time, therefore, at which the separation of the service into distinct branches should take place, seems to me to be when an officer, after having served as a Joint-Magistrate, is about to be promoted to the charge of a district. From this point I would have two distinct lines, the judicial branch being placed in point of pay and emoluments upon exactly the same footing as Magistrates and Collectors. To make the judicial as attractive as the executive line, there should be some Judgeships on Rs. 3,000 a month to correspond with the Commissionerships. Indeed, I think it an act of bare justice to the Judges that some Rs. 3,000 appointments should be at once created. They are now as a rule debarred from the

Commissionerships, and there ought, I think, to be an intermediate grade between their present appointments and the High Court.

A more radical separation of the executive and judicial branches would, in my opinion, be very prejudicial to the interests of the country. I have heard it suggested that no executive officer should exercise any judicial powers at all, not even the powers of Magistrate. I hope that such a proposal will not find favour with the Government. Such a measure would greatly enfeeble the hands of district officers, already sufficiently weakened by a system of excessive centralization. I think the judicial branch of the service wants strengthening, because with districts near Calcutta the native bar has so greatly improved, that unless a Judge has devoted some time to legal studies, he is not capable of holding his ground against the advocates that surround him. This is a very serious, and not a very creditable state of things, but I feel sure that, if a certain number of officers are told off when they become Joint-Magistrates for the judicial line, we shall have in a few years a body of Judges commanding the respect and confidence of the public, as much from their legal attainments as from their knowledge of the usages of the country. But while this very necessary reform is introduced, I trust that the powers of executive officers will be in no respect diminished. To the above extent, therefore, I would strongly advocate the measure proposed.

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## XI.

### *Opinion of Lord Ulick Browne, C. S.*

*From Lord H. Ulick Browne, Officiating Commissioner of the Chittagong Division, to the Secretary to the Government of Bengal,—(No. 1042, dated Chittagong, the 7th September, 1868.)*

I have the honour to acknowledge the receipt of the Under-Secretary's letter No. 2515, dated 1st May, 1868, in which the

Lieutenant-Governor does me the honour to ask my opinion on a proposal to constitute a separate and distinct judicial branch of the Indian Civil Service.

2. There is a good deal to be said in favour of such a change, which has been from time to time suggested, chiefly on two main grounds. One of these is referred to by the Right Hon'ble the Secretary of State, *viz.*, that at present there is no regular judicial training for officers destined, in the ordinary course of the service, to occupy the post of District Judge. But it is not merely a want of regular judicial training that is complained of by those who view the question of separation into executive and judicial branches with a purely judicial eye. For the last three or four years the High Court have pressed the Government to insist on Magistrates of districts devoting more time to important original criminal cases, so as to at least accustom themselves a little to one branch of the duties they will shortly have to discharge as District Judges. But, as a general rule, it has been found impossible for district officers to meet the wishes of the High Court, owing to the extent and variety of their executive duties. I remember that in reporting on the point about eight months ago, I submitted an opinion, that unless Government went to the expense of dividing districts, or else of making the separation now under discussion, it would probably be impossible for district officers to devote more time to original cases, especially as regards the more advanced districts near the Presidency. And the Court were afterwards pleased to admit that they could not expect it, under the present system, in a district like that (Nuddea) in which I was serving when I submitted my report. It thus appears that a Magistrate of a district is not only without judicial training, but is usually also out of practice, as regards the most important criminal cases, for some years before he is raised to the bench.

3. This want of practice and training will be felt still more when the law, transferring the decision of rent suits from the Courts of Collectors and Deputy Collectors to the regular Civil Courts, comes into operation. If the constitution of the

Civil Service remains unaltered for a few years after the law is in force, it will happen that the first occasion on which an officer sees anything in the nature of a civil suit of any description will be on the day that he takes his seat as a District Judge.

4. This is not a time to discuss the question whether the increasing introduction of English law, English rules of procedure and evidence, and English principles of administration of justice generally, are suited to the people of India, and how far it will increase the present unpopularity of our Courts of Justice, and necessarily of our rule. It would appear that the measure has been decided on and must be accepted as a fact. This being so, it certainly seems very desirable that the officers who have to discharge judicial duties among the mass of the population should, by early study of the laws and principles by which they must be guided hereafter, avoid conflict of opinion with the superior Court, and consequently delay and vexation in the final decision of suits.

5. And the English objection to making the same officer thief-catcher and thief-trier is one that cannot be altogether lost sight of as matters stand.

6. The other main ground on which the change is advocated is the heavy and annually increasing executive work, the greater part of which must be done or actively superintended by the district officer himself. As the High Court wish the Magistrate to take up more original cases, so does the Commissioner wish the Magistrate could devote even more time than he does to executive work, and I believe that it is on this ground, among others, that the transfer of rent suits is proposed. The more administration advances the more we see how much there is of executive and administrative work to be done in a district. Ideas of improvement are often dropped for sheer want of time to carry them out, and now-a-days an officer has very little leisure to talk to all classes of people and become thoroughly acquainted with his district.

7. Another advantage would be, that in the most impor-

tant districts, there would be more experienced officers, for I think this would necessarily be a part of the change. But this will be discussed in reporting on the second division of the subject.

8. Here I find it necessary to touch on the second point raised in Mr. Mackenzie's letter. Though there would be a prospect of such advantages as I have described, they would be dearly bought, indeed, if they involved any further sacrifice of influence and position on the part of district officer. I think the extent to which personal influence has diminished in these provinces is much to be deplored, and that it is of the last importance to at-least prevent a further diminution of it. In one respect there would probably be an accession of influence and authority, for it may reasonably be expected that one consequence of the change would be, that the executive head of the district would have full and complete control over the police, as he used to have before the present police system was introduced, against, I believe, in so far as that point is concerned, the opinion of nearly every Commissioner and Magistrate in the country. That system has been gradually modified in the direction of giving the Magistrate more and more control almost ever since it came into operation. If full and complete control over the police then were restored by the change, it would be a further advantage. But if the change were made "absolutely," *i. e.*, if it were so complete as to deprive the executive head of the district of the power of himself taking up a case of any description under any circumstances, then, notwithstanding all the advantages that might be expected in the matters referred to above, I would most strongly deprecate any change whatever. In that case the District Magistrate would be in the position of a Sergeant of Police in England. He would not be in the present position of a District Superintendent of Police, for that officer's position is materially strengthened by the support of the Magistrate, whose chief interests with his varied powers and duties is in his executive charge. In the event of so complete a change as that suggested, I think the

district officer's position and influence would be seriously affected—indeed, I am inclined to think this will perhaps be the case to a trifling extent when the rent suits are transferred. The district officer need seldom use his judicial powers, but the knowledge that he could do so if he chose would be everything.

9. Subject, then, to the reservation of a discretionary power in the District Officer to take up any original cases he pleases, I am on the whole in favour of separating the Civil Service into executive and judicial branches, the former being styled Deputy and Assistant Commissioners, and the latter by judicial designations. I understand that suggestions as to the training of the judicial branch are not required.

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## XII.

*Extract from a Note by Mr. (afterwards Sir) H. S. Maine, 12th March, 1868.*

I think the question very serious, and one which can by no means be disposed of by repeating the commonplace argument for the present state of things. It is all very well contending that an administrative training is essential to judicial efficiency, but the proof of the pudding is in the eating: and I think I do not misstate the opinion of nearly all the judges, Civilians as well as Barristers, in the Bengal and North-West High Courts, when I say that they regard the great majority of the District Judges in both provinces as shamefully inefficient. Sir Barnes Peacock, in my absence, almost forced Mr. Hobhouse out of the Legislative Council into the High Court, because he did not know a single District Judge (this I have strong reason to believe was the real ground of his persistence) whom he could reasonably recommend for the Bench. There is nothing, in my judgment, which so seriously threatens the privileges of the Civil Service (which I at all events am most anxious to respect) as the discredit now more and more attending to the District Judges.

I do not undervalue an administrative training, but to say it can ever wholly supply the want of sustained judicial or forensic experience is to me simply preposterous.

I cannot see why a young civilian should not declare for one of two lines immediately on coming out. He will probably know his own real tastes then as well as he can ever know them afterwards. He can have as much administrative training as is good for him, but after a certain time or on rendering a certain point of service, he might be confined to a certain class of appointments and have no claim on the rest. I would begin this experiment in Bengal Proper, where, as it seems to me, the interchanging of judicial and administrative functions is ruinous to the credit and efficiency of both branches of the service.

*Note on above by Sir John Strachey, 28th March, 1868.*

I quite agree with these remarks of Mr. Maine.

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## XIII.

### *Extract from a Note by Sir William Markby, 2nd November, 1868.*

It is difficult to imagine that anything but the exigency of circumstances could have given rise to what I unhesitatingly assert to be the worst possible combination, namely, the formal administration of justice by unprofessional men. I can quite comprehend, and under certain circumstances should assent to, the notions which give rise to the everyday arguments in favour of common-sense and practical experience as against theories and technicalities; but having once bound down the administration of the law by theories and technicalities, how is it consistent with reason to appoint as administrators of the law persons to whom these theories and technicalities must be unintelligible? The existence of the Codes of Civil and Criminal Procedure are in themselves a sufficient proof of the technicality of the law as administered in India. For every

step a given form is prescribed, which must be rigidly followed. By the very codes themselves the duty of seeing that this is done is, in many instances, expressly thrown upon the Judge, and practically this is so to a very much larger extent. The Judge in this country has even to perform the extremely difficult task of settling the issues to be tried—a responsibility which is in most countries thrown upon the litigant parties, and which is not unfrequently performed by men specially trained for that purpose alone. Nowhere except in the Presidency towns is there a Bar from which the Judge derives assistance : and not unfrequently the Judge must be not only counsel, but attorney also, if business is ever to be proceeded with. Again, not only is the procedure difficult, but the questions of law to be dealt with are transcendently so. For the purposes of the present administration of justice, the Hindu and Mahommedan law books give us nothing but dogma : they contain no principles, their *rationale* is worth nothing. Consequently, where dogma fails, Judges have to evolve laws out of those general principles which are, or at any rate which we consider to be universal, a problem about as difficult for the best trained lawyer as can well be conceived, and which is no more likely to be solved by a man whose mind has not been specially trained for the purpose than a problem in geometry or mechanics. Further than this, by reason of the very extensive opportunity which in this country is given for appeal, Judges are obliged to leave such a record of their proceedings as will stand the severest scrutiny. Many men, who are capable of arriving at a right conclusion, fail entirely to perform this portion of their duty, and for my own part I have much misgiving lest decisions really well founded are overruled in the Court of Appeal by reason of the insufficient or incorrect statements, which the latter Court is obliged to act upon, of the course taken below.

It is not impossible that past experience may be appealed to in favour of the existing system ; and that under the existing system, that object has been attained, which is so important;

as by comparison to cast all others in the shade, I do not for a moment deny. The administration of justice in India is no doubt on the whole thoroughly upright and impartial, but is it right to affirm that it is thoroughly effective? I have the greatest doubt whether it is so. Though the Judge may not be corrupted, the law may be made the instrument of corrupt designs, and I fear it is so to a very alarming extent. I am strongly of opinion that men professionally trained would have been far more successful in counteracting the artifices by which the most careful provisions of the Legislature are so frequently twisted into a machinery for oppression and wrong. Nor should it be forgotten at how low an ebb is our knowledge of Hindu and Mahommedan law. We are as helpless in dealing with questions of such everyday occurrence as the legal status of a Hindu with reference to the joint family, as we were twenty years after our first occupation of the country. I do not think that this would have been the case if well-trained lawyers had been brought in contact with the people to any large extent, and the laws of the surrounding country had been made the subject of a regular scientific study.

It must also be remembered—and this is a consideration which marks the urgency of the present question—that we are now professing to establish, by direct legislation, a complete body of law for this country. This great task, however well performed, will be so much labour thrown away, unless the law be administered by men of experience, and enlightened by scientific knowledge. It is impossible that the successive chapters of the law, as promulgated, should not require revision to correct the errors brought to light by their practical application; but it is most essential that the errors so corrected should be real defects, and not erroneous interpretations of the law as originally laid down: otherwise the elegance and simplicity of the whole code—two of its most essential features—will be marred. And here I would most emphatically say—trust not too much to the higher Courts of Appeal to correct the errors of less competent Judges. Depend upon it, that

the Courts which will mainly settle the application of the code are those which apply its provisions earliest and most frequently, that is to say, the Courts of the Mofussil.

Supposing the evils of the present system to be acknowledged, I will now state why the remedy suggested in the letter of the Secretary of State appears to me to be wholly inadequate. The suggestion there made is—"that such an alteration might be made in the system of promotion, which now obtains among civilians, as would obviate the common occurrence of a transfer to the Judicial Bench of men who have had no special preparation for the performance, of its duties, and are too old to commence the necessary training." Of course, changes in the present system of promotion would be necessary, but that is, in my opinion, only a very small part of what is required in order to secure a body of judicial officers properly qualified for their duties.

To make a good Judge, two qualifications are necessary—knowledge and experience; and what I entirely deny is, that any mere change in the system of promotion would, under the present system, produce men with either sufficient knowledge or sufficient experience for the purpose. If the present system were changed, as proposed, the same men, as now, would, for the most part, be prepared for the higher judicial offices by the exercise of inferior jurisdiction in criminal cases. But what is the amount of knowledge of law to be expected of such men? The knowledge brought to this country by a youth who has just obtained his appointment, even if learnt in the best of schools, must, from the shortness of the time spent in acquiring it, be necessarily extremely small. But further than this I am convinced that it is also the worst possible in kind. It is generally a smattering of English law learnt from men who are themselves ignorant of the subject. And though it is not impossible for a man to acquire a theoretical knowledge of law without assistance, and for an exceptionally industrious man to find time for study without neglecting the routine of his daily duties, no one, I think, would venture to count much

upon this source of improvement amongst a body of men once launched on their official career. Knowledge, when once a proper foundation is laid, will grow without much study, but this presupposes a period of careful and thorough preparation which is now wanting.

Then, again, with regard to experience, that, no doubt, must be gained here, but I see no way of gaining it under the present system, however the system of promotion may be changed. The original jurisdiction in civil cases is almost exclusively in the hands of natives, and while that is so, I cannot myself see exactly what would be the career of a man destined for any of the higher judicial offices usually held by Europeans between the time of his arrival in the country and his turn coming for one of these appointments. It seems to me that it would be difficult to find even sufficient employment to fill up his time. At any rate, I cannot conceive that a man relegated to the inferior administration of criminal law, would even, in the way of experience, be making any very substantial advance towards fitting himself for his ultimate destination : nor even if it were possible to appoint young civilians to civil judicial offices would the matters, by that change alone, be very much mended. What we are now considering is, how is a Judge to gain experience. Now by this I understand to be meant, how is a Judge to learn the art of dealing wiht the questions which come before him with that promptness, completeness and efficiency so essential to the despatch of business. To learn this is essentially a process of imitation, and it cannot be learnt by a Judge sitting alone : nor in my opinion can there be a greater fallacy than a supposition, which appears to prevail in this country, that a Court of Appeal or Revision can, in any way, operate usefully to teach inferior Judges their duties. I suppose the strange practice which exists in India of superior Courts pointing out errors in decisions of the Courts below, although no person complains of them and though no alteration is made in the result arrived at, originated in this false idea. In my opinion, this practice is simply a gratuitous

mischief. I think a Court of Appeal ought to take every pains to conceal from the public eye even those errors which it is obliged to correct.

A Judge who sits alone, and is never brought in contact with men of superior capacity to himself, will advance but little in judicial experience. To my mind he is more likely to be confirmed in vicious habits. On the other hand, if associated, even only occasionally, with men wiser and more experienced than himself, he will by practice acquire the necessary skill. In this, as in all other cases where skill is to be acquired, practice is essential ; but practice alone without an occasional lesson from a master is worse than useless.

It is not, however, by the exercise under guidance of the judicial function alone that judicial experience can be gained. It is gained by every advocate and by every intelligent officer who performs his duties in a Court presided over by a skilled Judge. What then are the changes in the system of judicial appointments necessary in order that the two main requisites for a Judge—independent of character—namely, scientific knowledge and judicial experience, may be readily acquired ?

I admit that with respect to both great difficulties exist. With regard to scientific knowledge, it unfortunately happens that England is the one country in Europe in which there is no school where law is scientifically taught, and I maintain that it is a scientific knowledge of law, and not a mere knowledge of English law, which is required for men coming out from England to hold judicial appointments here. If anything is to be added, it is an acquaintance with the actually prevailing law of India. A knowledge of mere English law is of very little use—that system of laws being of all others the least useful as a vehicle for the acquisition of general principles of jurisprudence, and least adapted for application in any country but its own.

There has, however, been lately manifested by a considerable and influential number of persons in both the older English Universities a strong desire to take up the teaching of law, though the attempt is not at present very well directed : and

two Royal Commissions have strongly urged that the Inns of Court should apply their vast and now wasted revenues to this important purpose. It appears to me, therefore, that a well timed and well founded demand might be made by the Government of India that steps should be taken for the speedy establishment of a school of law in England suitable for the scientific training of men for the administration of justice in this country * * * *. I also think the study of law in India should be placed on a totally different footing. We have seen already a sufficient number of really eminent native lawyers to encourage us to expect that this country will produce a considerable number of men thoroughly qualified for the performance of judicial duties : but they must have the means of obtaining a sound legal education. For this purpose a regular Faculty of Law should be established in each University. * * * * With regard to experience, the remarks I have already made indicate the changes necessary in the mode of selecting judicial officers. The first great object should be to widen, as far as possible, the field of selection for appointments in every grade. I think both the native and European Bars would furnish many excellent Judges, and many more still if law were as well taught as it ought to be, and it were known that these appointments were open to practising advocates. It is true, no doubt, that the most successful would hardly accept judicial appointments, but it is not true, as is sometimes asserted, that a man who fails as an Advocate will make a bad Judge. The qualities requird for the two careers are so different, nay, in some respects, so opposite, that, as the English Bench testifies, success or failure in the one is no complete test of capacity or incapacity in the other.

Nor do I see any advantage in the present system by which the minor civil judicial offices are confined to natives, and the higher ones to Europeans. On the contrary, I think that both Europeans and natives might be promoted from grade to grade through all civil judicial offices, and I would even go so far as to say, with the improvements in education which I suggest,

through all judicial offices, civil and criminal : and ultimately the inconvenience of summoning men from England wholly without preparation to sit in the higher Courts of Appeal might be avoided.

I think also there is much to be said in favour of a suggestion which was, I believe, made some time ago by Sir Erskine Perry that appointments to judicial offices in India should be thrown open to the English, Scotch and Irish Bars. It is perhaps scarcely possible that a large number of appointments should be made from this source : but it is by no means impossible, if the proper means existed, that a considerable number of men would deem it worth while to fit themselves in Europe for the higher judicial offices in India. As a temporary measure at any rate, I think this is a source which is not to be neglected, and it must not be forgotten that a zilla judgeship is, in a pecuniary point of view, very little inferior to a judgeship in the High Courts.

The next point will be so to contrive a system of circuits that inferior Judges shall occasionally sit with superior, in order that the former may gain from the example of the latter the necessary skill : nor is this suggestion open to the objection which might be speciously urged against it, that it is not the duty of one Judge to teach his business to another : for by this change an independent advantage will be gained, which alone would justify its introduction. It would greatly strengthen the lower tribunals, and would thus enable the Legislature considerably to curtail the power of appeal which suitors now possess, and which they exercise to an extent which may be almost termed scandalous.

## XIV.

*Extract from paragraph 6 of a letter from the Government of India, Home Department, No. 2221, dated 23rd December, 1870, to the Government of the Punjab.*

"These considerations seem to the Governor-General in Council to establish conclusively that the two branches of the

service (judicial and executive) ought to be separated. Such separation, however, must be accomplished agreeably to the principles involved in the following observations. His Excellency in Council is of opinion that no step should be taken which would weaken the authority of the Executive District Officers. He believes that their position would be very greatly weakened if they were deprived of their criminal jurisdiction, and were obliged to apply to others for the purpose of procuring the punishment of those offences which at present they deal with themselves. He would not, therefore, propose that the separation of executive and judicial status should be carried to the extent of depriving the District Officers of their magisterial powers. He would prefer the introduction into the Punjab of a system similar to that which prevails in Bengal and in the North-Western Provinces."

The letter then went on to describe the system in Bengal and the North-Western Provinces.

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## XV.

*Extract from the Minute of Sir Fitzjames Stephen on the Administration of Justice in India, printed as No. XXXI of the Selections from the Records of the Government of India, Home Department, dated 1872.*

"I propose to criticise the existing Codes of Criminal and Civil Procedure hereafter. For the present I will confine myself to a consideration of the bearing of these conclusions upon the question of the division of the two branches of the service. They lead me to the opinion that the best division of labor at present to be had would divide not the judicial and executive branches of the service, but civil jurisdiction and criminal jurisdiction united with executive power.

Division of labour.

"The reasons of the first are as follows. I have already observed that it seems to me essential that the position of the District Officers should not be materially weakened;

Reasons for division of labour suggested.

but, if their whole judicial power were taken from them and confided to purely Judicial Officers, nothing would be left in their hands except miscellaneous executive functions. They would have the duties of engineers, health officers, way wardens, &c., but they would have no authority which would excite in the minds of the people at large either hope or fear in regard to them, and they would certainly be deprived of one most effectual way of becoming acquainted with their habits and feelings. The exercise of criminal jurisdiction is, both in theory and in fact, the most distinctive and most easily and generally recognized mark of sovereign power. All the world over, the man who can punish is the ruler. Put this prerogative exclusively in the hands of a purely Judicial Officer who has no other relations at all to the people, and who passes his whole life in a Court, and I can well believe that the result would be to break down in their minds the very notion of any sort of personal rule or authority on the part of the Magistrate.

Summary of arguments as to District Officers.

"I do not think that, situated as we are, the law can ever be carried out effectually, except in one or two ways, namely, either by the strong personal influence of Magistrates known to and mixing with the people, or by an enormously increased military force. In a few words, the administration of criminal justice is the indispensable condition of all Government, and the means by which it is in the last resort carried on. But the District Officers are the local governors of the country; therefore the District Officers ought to administer criminal justice. Also it is necessary that the District Officers should have personal and friendly relations with the people. But this, under the circumstances of British India, can be secured only by investing them with miscellaneous executive functions. Therefore, it is necessary, upon the whole, that the District Officers should both administer criminal justice and discharge miscellaneous executive functions.

"It will not, of course, be supposed that I mean to throw doubt on the utility of dividing, as far as possible, judicial and

executive magisterial duties between different Magistrates. Practically the Joint-Magistrate is in most districts the criminal Judge in common cases, and in this there is no harm, but on the contrary great advantage. The division between the Magistrates themselves of judicial and executive duties is one thing; the union of these powers in Magistrates as a class is quite another. The scheme proposed by the Bengal Government, to which I have already referred, would probably be as good a mode of obtaining the first of these objects as could be suggested. The extent to which it should be adopted is a question of economy. If the state of the revenue is such that a sufficient number of magistrates can be afforded to enable one set to confine themselves principally to judicial, and another set to confine themselves principally to executive functions, no doubt the advantage will be great, but this, however important, is a matter of detail, which depends not on general principles but on the position of affairs at a given moment.

Effect of the evidence. Position of District Officers should be maintained.

"I now proceed to state the effect which a consideration of the whole of the evidence, of which I have tried to review the salient points, leaves upon my mind. It seems to me that the first principle which must be borne in mind is, that the maintenance of the position of the District Officers is absolutely essential to the maintenance of British rule in India, and that any diminution in their influence and authority over the natives would be dearly purchased, even by an improvement in the administration of justice. Within their own limits, and as regards the population of their own district, the District Officers are the Government, and they ought, I think, to continue to be so.

"This consideration narrows considerably the range of possible proposals as to the judicial organization. We must have all over the country real and effective governors, and no application of the principle of the division of labor ought, in my opinion, to be even taken into consideration which would not leave in the hands of District Officers such an amount of power

as will lead the people at large to regard them as, in a general sense, their rulers and governors."

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## XVI.

*Extract from a Note by the Lieutenant-Governor of Bengal (Sir Geo. Campbell) on Sir (then Mr) Fitzjames Stephen's Minute of 1872, dated 15th July, 1873, No. 3242.*

"As respects the details of the division of the service into two branches, the Lieutenant-Governor agrees in Mr. Stephen's general view that executive should be combined with criminal functions so far as regards the repression of and inquiry into crime, and the disposal of criminal cases of inferior importance; particular Magistrates being, as suggested, told off as much as possible for the trial of such cases."

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## XVII.

*Opinion of Sir Donald Macleod as quoted by Mr. Fitzjames Stephen in his Minute.*

"A complete separation between the judicial and administrative branches of the functions of the Civil Service in this province would be inexpedient, partly because the exercise of judicial functions is one important means out of many for obtaining that intimate acquaintance with the habits, feelings, customs, and transactions of the people which is essential for administrative excellence, partly because the number of cases, the decision of which involves a profound acquaintance with the recondite principles of law, is insignificantly small, while the law itself is becoming daily simplified by the publication of well-digested Codes."

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## XVIII.

*Opinion of the Hon'ble Mr. Justice Melville of the Bombay High Court (para. 4) on the Minute of Mr. Fitzjames Stephen.*

"In saying that Executive officers should no longer discharge

judicial functions, I am speaking of the duties of a Judge as distinguished from those of a Magistrate.

"The Bombay system of uniting the offices of Collector and Magistrate in a single person, who is aided by a staff of Assistant Collector-Magistrates, is in my opinion the best which could be devised. Experience has shown that these duties can be combined without detriment to efficiency. The maintenance of the position of the District Officers is, as Mr. Stephen observes, absolutely essential to the maintenance of British rule in India, and this position would be seriously compromised in the eyes of the natives if the District Officers had not the powers to try and punish criminals. In large towns it may be necessary to appoint one or more officers to dispense magisterial duties only, but (apart from the consideration just stated) such a measure would not, I think, be popular in several districts."

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## XIX.

*Extract from paragraph 4 of Despatch of the Government of India, No. 313, Department of Finance and Commerce, to the Secretary of State, dated 5th November, 1883, relative to the reorganisation of the Punjab Commission."*

"While fully adhering to the general principle of effecting a more complete separation between judicial and executive function, we are not satisfied that the precise mode of separation suggested by the Local Government was the best that could be devised. We were of opinion that not only should commissioners be entirely relieved of their judicial functions, but that Deputy Commissioners should also have their hands set free for revenue and executive duties which are annually becoming heavier and more important and therefore the suggestion of the Punjab Government that in 14 districts, where the work is admittedly heavy enough to require the appointment of a special Civil Judge, the Deputy Commissioner should retain civil judicial powers did not commend itself to us. On the other hand, we did not approve of the Deputy Commissioner divesting him-

self of the functions assigned by the Criminal Procedure Code to the Magistrate of the district, as appeared to be to some extent intended."

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# BOOK II

# INTRODUCTION

In this *Book* are inserted chronologically all important opinions, articles, statements and letters that have appeared in print in England on the subject since the publication of the late Mr. Manomohan Ghose's pamphlets. Mr. Romesh Chunder Dutt's famous Note, Sir Richard Garth's statements and letters, Sir Richard Couch, Sir John Budd Phear, Sir William Markby and Sir Raymond West's opinions on this question will all be found in this part of the book. The article contributed by Sir Charles Elliott in the pages of the *Asiatic Quarterly Review* for October 1896, bringing under review and severe criticism the cases illustrating the evils of the system compiled by the late Mr. Manomohan Ghose and published in the Appendix of this work, as well as the replies which that article elicited from the pens of Sir John Budd Phear, Mr. H. J. Reynolds and Mr. C. D. Field, late of the Calcutta High Court, have also been duly inserted in this *Book*. The memorial submitted to Lord George Hamilton in July 1899 by Lord Hobhouse, Rt. Hon. Sir Richard Garth, Rt. Hon. Sir Richard Couch, Sir Charles Sargent, Sir William Markby, Sir John Budd Phear, Sir John Scott, Sir William Wedderburn, Sir Roland Wilson and Mr. H. J. Reynolds praying for the separation of Judicial from Executive duties in India comes at the close of this *Book*.

The reader will find that, excepting such notes as struck by Sir Charles Elliott, a considerable unanimity of opinion prevails among retired Anglo-Indian statesmen on the great wisdom and expediency of separating the Judicial and Executive Functions in District Officers in Bitish India.

In this connection, I cannot but give expression to the sense of universal regret and disappointment that is still felt

throughout the country in the fact that the late Mr. Monomohan Ghose did not live to reply himself to the article of Sir Charles Elliott and that his premature and sudden death was caused by the shock which he is reported to have felt on reading Sir Charles Elliott's defence of the existing system.

**Editor.**

## I.

*Statement (printed in "India" for August 1893) by the Right Hon. Sir Richard Garth, Q. C., with reference to Mr. Romesh Chunder Dutt's Scheme for the Separation of Judicial and Executive Functions.*

Mr. Romesh Chunder Dutt has been kind enough to furnish me with an outline of the following scheme, before he sent it to the press; and I am extremely glad to find that a civilian officer, who has had so large and varied an experience as a District Magistrate in Bengal, is not only strongly in favour of a reform of the present system, but considers that it may be carried out with little or no additional expense, and with great advantage to both branches of the Service.

So far as I am capable myself of forming an opinion upon his scheme, I entirely approve it. It seems to me the most natural and obvious means of separating the two great divisions of labour—the Executive and the Judicial; and it commends itself more especially to my judgment because it is substantially in accordance with the plan which I had myself roughly suggested, and with that which was submitted by Mr. Manomohan Ghose to Lord Ripon in 1884.

The number and variety of a District Officer's duties is more than enough to occupy his whole time, without any Judicial work at all. In fact the judicial work which he does himself is very trifling. He rarely tries an original case; and his appellate work consists of a few unimportant appeals which come up to him from Magistrates not exercising first-class powers, and which, Mr. Dutt tells us, need occupy him only about two hours in each week. Thus the change proposed would relieve the District Officer of the little Judicial work he has, and (what is of far more consequence), would also relieve him from all responsibility as regards his subordinate Judicial officers—a responsibility which has only served hitherto to place him in a false position, and to tempt

him to use his influence and powers for a good many improper purposes, which, however much they may have been countenanced by high civilian officials, have deservedly incurred the odium of the public, and brought disgrace on our Indian Administration.

It seems only in accordance with reason that Magistrates who are employed upon Executive work, should be under the chief Executive officer of each district ; and that those who are employed in Judicial work, should be under the chief Judicial officer. To make Courts of criminal justice subservient to police authority is upon the face of it a dangerous anomaly. To make a Judge's promotion dependent on the favour of the chief police officer is a direct and most unwholesome incentive to him to gratify his master's wishes ; and so long as criminal Courts are virtually under police control, it is hopeless to expect from them either justice or independence.

The detailed arrangement, by which the Executive and Judicial work in each district may best be distributed amongst the several subordinate Magistrates, is a matter which Mr. Dutt, as an experienced District Officer, understands far better than I do. But where there are admittedly four or five subordinate officers, who all take a share in the Executive and Judicial work of each district, there ought surely to be no great difficulty in assigning the Executive portion of the work to some of those officers, and the Judicial portion to the others.

The distribution, as Mr. Dutt tells us, must vary according to the requirements of each particular district ; and I have no doubt he is right in saying that the change should be confined, at any rate in the first instance, to the Regulation Provinces.

I trust that his scheme may at least pave the way to some fair and impartial enquiry as to whether this much desired reform, of which Lord Kimberley and Lord Cross have both so strongly signified their approval, may not be carried out with as little delay as possible.

## II.

*Scheme (printed in "India" for August, 1893) suggested by Mr. Romesh Chunder Dutt, C.I.E., Commissioner of the Orissa Division (at that time District Magistrate of Midnapur).*

The recent discussions on the subject of the separation of Judicial and Executive functions in India have given sincere gratification to my countrymen in India. They have read with satisfaction, and also with feelings of gratitude, the views expressed by Lord Stanley in the House of Lords, and the clear and emphatic opinion on the subject expressed by Lord Kimberley. They have learnt with sincere joy that the system of uniting Judicial and Executive functions in the same officer has been condemned by two successive Secretaries of State, Lord Cross and Lord Kimberley. And they entertain a legitimate hope that a policy which has been thus condemned by the highest authorities in Indian affairs will not long continue to be the policy of British rule in India.

Sir Richard Garth, late Chief Justice of the High Court of Calcutta, whose paper on this subject led to the discussions in the House of Lords, has since explained the history of the present system of administration in a clear, lucid, and forcible manner. He has shown that so far back as 1860 a Commission appointed to report on the police declared that "the judicial and police functions were not to be mixed up and confounded." He has pointed out that the late Sir Barnes Peacock and other high authorities were against the union of these functions, and that the late Sir Bartle Frere, in introducing the Bill which afterwards became the Police Act of 1861, "hoped that at no distant period the principle (of the separation of Judicial and Executive functions) would be acted upon throughout India." Sir Richard Garth has also informed the public that between 1865 and 1868 the highest civilian authorities in India were again consulted on the subject, and, according to Sir James Stephen, the District Magistrates themselves were "greatly

embarrassed by the union in their persons of Judicial and Executive functions." Sir Richard has further told us that under Lord Ripon's Government opinions were again collected, and the present system was only continued because the retention of Judicial powers in the hands of a District Officer was considered (and very wrongly considered, *vide* Lord Kimberley's speech) "essential to the weight and influence of his office." And, lastly, Sir Richard has quoted the words of the present Secretary of State that the present system "is contrary to right and good principle," and he has also quoted the words of the late Secretary of State, who concurs in this opinion with Lord Kimberley.

Such are the opinions of men most capable of forming a judgment on the present system of administration in India, and responsible administrators are anxious to effect a reform which will remove the evil without materially adding to the cost of administration. A practicable scheme of reform will be not unwelcome at the present moment, and many of my countrymen and some of my English friends have asked me to state my views on the subject, as I happen to be in England just now. I venture therefore to suggest the leading features of a scheme which has for many years appeared perfectly feasible to myself, and which I believe will meet the views and wishes not only of my countrymen, but of most Englishmen also, who are quite as anxious for wholesome reform on this point as my countrymen.

It is necessary for me to state that I have been employed on administrative work in Bengal for twenty-two years, and that I have had ample opportunities to observe the practical working of the present system of administration during this period. Within this period I have had the honour of holding charge of some of the largest and most important districts in Bengal—like Bardwan, with its population of a million and a half, and Bakarganj, with its population of two millions, and Midnapur, with its population of two and a half millions, and Maimansingh, with its population of three and a half millions—

which is equal to the population of many a small kingdom in Europe. In these extensive and thickly populated districts I have, for years past, combined in myself the functions of the head of the Police, the head Magistrate, the head Superintendent of Prisons, the head Revenue Officer, the head Tax Collector, the head of the Government Treasury, the head Manager of Government Estates, the head Manager of Minors' States, the head Engineer, the head Sanitary Officer, the head Superintendent of Primary Schools, and various other functions. I have for years past directed and watched police enquiries in important cases, had the prisoners in those cases tried by my subordinates, heard and disposed of the appeals of some of those very prisoners, and superintended their labour in prisons. And during all these years I have held the opinion that a separation of Judicial and Executive functions would make our duties less embarrassing, and more consistent with our ideas of judicial fairness; that it would improve both Judicial work and Executive work; and that it would require no material addition to the cost of administration.

Bengal is divided into nine Divisions, viz. : 1. Presidency. 2. Bardwan. 3. Rajshahi. 4. Dacca. 5, Chittagong. 6. Orissa. 7. Patna. 8. Bhagalpur. 9. Chutia-Nagpur. I think it is not feasible, nor desirable perhaps for the present, to effect a separation of Judicial and Executive functions in the Division of Chutia-Nagpur which consists of Non-Regulation Districts. It is also, perhaps, undesirable to effect such separation in the Districts of Darjiling and Jalpaiguri in Rajshahi Division; in the Hill Tracts of Chittagong Division; and in the Santal Parganas of Bhagalpur Division. In the remaining portions of the Province it is possible to effect the separation at once.

The population of Bengal (excluding Tributary States and the States of the Maharajas of Kuch-Behar, Sikkim, and Tipperah), is, according to the census of 1891, *seventy-one millions* in round numbers. The population of the districts alluded to in the last paragraph, in which a separation of Judicial and Executive functions is for the present impractic-

able, is *seven millions* in round numbers. In the remaining portions of Bengal, having a population of *sixty-four millions*, it is possible to effect the desired separation at once.

Generally speaking, there are two senior Covenanted officers in every Regulation District in Bengal, viz., a District Judge and a District Magistrate. The District Judge is the head of all subordinate judicial officers who dispose of civil cases, and he also tries such important criminal cases as are committed to the Sessions. The work of the District Magistrate is more varied, as has been indicated above. He is the head of the police, supervises prisons, collects revenue and taxes, sells opium and settles liquor-shops, constructs roads and bridges, regulates primary education, and combines with these and other Executive duties the functions and powers of the head Magistrate of his district.

My scheme is simple. The District Magistrate, whom I will henceforth call the District Officer, should be employed purely on executive and revenue work, which is sufficiently varied, onerous, and engrossing, and should be relieved of his judicial duties, which should be transferred to the District Judge. The subordinates of the District Officer, who will continue to perform revenue and executive work only, will remain under him ; while those of his presnt subordinates who will be employed on purely judicial work should be subordinate to the Judge and not to the District Officer.

At present the subordinates of the District Officer combine Executive and revenue and judicial work. A Joint-Magistrate or Assistant-Magistrate (subordinate to the District Officer) tries criminal cases, and also does revenue and executive work. A Deputy-Magistrate (similarly subordinate to the District Officer) also tries criminal cases and does revenue and executive work. This arrangement must be changed.

I will first take the case of Joint-Magistrates and Assistant-Magistrates, who are Covenanted officers. Young civilians, as soon as they arrive in Bengal, are posted as Assistant-Magistrates ; they try criminal cases and also help the District

Officers in his revenue and executive work. After they have had some experience in their work and learnt something of the people, and after they have passed two examinations in Indian law and accounts, and the languages of the Province, they are promoted to be Joint-Magistrates. And the Joint-Magistrate tries all the more important criminal cases, and performs much of the important criminal work of the district. And in course of time he becomes a District Officer or a District Judge.

Referring to the Bengal Civil List for April, 1893, which is the last number that is available to me in London now, I find that the present number of Joint-Magistrates and officiating Joint-Magistrates in Bengal (excluding those acting in higher capacities, or on special duty) is only twenty-two. And the number of Assistant-Magistrates, after such exclusion, is also twenty-two. As there are over forty districts in Bengal, it is clear that on the average each District Officer has only one Covenanted Assistant (Joint or Assistant-Magistrate) and no more. In some districts there are more than one, in smaller districts there are none.

I propose that the Assistant-Magistrates should be employed purely on revenue, executive and police work, and should be subordinate to the District Officer. And when the Assistant-Magistrates are promoted to be Joint-Magistrates, they should be employed purely on judicial work, and be subordinate to the District Judge.

This proposal will not only secure the separation of functions contemplated, but will secure two other distinctly beneficial results. In the first place young civilians fresh from England, and wholly unacquainted with the manners and habits, and even the colloquial language, of the people of India, will be stopped from trying criminal cases until they have acquired some local knowledge and experience by doing revenue and general executive work, and watching police cases and police administration. And in the second place, such young civilians will receive a more systematic and less confused training in their duties by devoting their attention during the

first two or three years to purely executive and revenue and police work, and then employing themselves for some years on purely judicial work.

I next come to the Deputy-Magistrates, who are uncovenanted officers, and generally natives of India. They also combine judicial, executive, and revenue work, and are subordinate to the District Officer. The Civil List gives their number as 305 in all ; but excluding those on leave, or employed on special duty, or in sub-divisions (of which I will speak later on), there are, on an average, only four Deputy-Magistrates in the headquarters of each district to help the District Officer. In small districts there are, perhaps, only two ; in specially large districts there are as many as six.

I propose that in each district one-half of the Deputy-Magistrates may be employed on purely executive and revenue work, and be placed under the District Officer, and that the other half be employed on purely judicial work, and placed under the District Judge. In some districts, where the revenue work is particularly heavy, probably more than half the Deputy-Magistrates may be placed under the District Officer. And in other districts, where the criminal work is more important, the Judge may require more than half the Deputy-Magistrates. These details can be very easily settled. But in the main it is clear and self-evident that the officers who are able to cope with revenue and criminal work which is heaped on them in a confused manner will be able to cope with it better under the system of division of labour proposed above.

The results of the proposals made above will be these. The District Officer will still be the head executive officer, the head revenue officer, and the head police officer of his district. He will collect revenue and taxes, and perform all the work connected with revenue administration with the help of his assistants and deputies. He will continue to perform all executive work, and will be armed with the necessary powers. He will watch and direct police investigations, and will be virtually the prosecutor in criminal cases. But he will cease to

try, or to have tried by his subordinates, criminal cases, in respect of which he is the police officer and the prosecutor.

On the other hand, the District Judge will, in addition to his present duties, supervise the work of Joint-Magistrates and Deputy-Magistrates employed on purely judicial work. This work of supervision will be better and more impartially done by trained judicial officers than by over-worked executive officers, who are also virtually prosecutors. And the evil which arises from the combination of the functions of the prosecutor and the judge—of which we have had some striking illustrations of late—will cease to exist when the prosecutor is no longer the Judge.

The transfer of all judicial work to the District Judge will give him some additional work ; but he will easily cope with it with the additional officers who will be placed under him under the proposed scheme. In important and heavy districts the Judge will have a Joint-Magistrate under him, and the Joint-Magistrate may in exceptional cases be vested with the powers of an Assistant-Sessions Judge to relieve the District Judge of his sessions work. In districts where there are no Joint-Magistrates, a senior and selected Deputy-Magistrate can do the Joint-Magistrate's work, and efficiently help the Judge in his duty of supervision of criminal work. With regard to criminal appeals, the District Judge now hears all of them from sentences passed by first-class magistrates. The few appeals from second and third-class magistrates which the District Officer now hears may also be heard by the Judge, and the addition will scarcely be felt. In exceptionally heavy districts, like Maimansingh and Midnapur, criminal appeals did not take more than three hours of my time in a week. A trained Judicial Officer, like the District Judge, would do it in less time, and if he required help in this matter also, his subordinate Joint-Magistrate or a selected Deputy-Magistrate might be empowered to hear petty appeals.

It only remains to deal with what are called sub-districts or sub-divisions in Bengal. The Bengal districts are generally

extensive in area; and, while the central portions are managed and administered from headquarters, it is found convenient to form the outlying portions into separate sub-districts or sub-divisions, and to place them in charge of Sub-Divisional Officers. Such Sub-Divisional Officers (generally Deputy-Magistrates, sometimes Assistant or Joint-Magistrates) are also completely subordinate to the District Officer, like the assistants at headquarters.

In Bengal (excluding the backward districts in which the introduction of the proposed scheme is at present impracticable) there are seventy-five sub-divisions. There is only one Sub-Divisional Officer in each sub-division, and he performs revenue and executive and judicial work in his sub-division, as his superior, the District Officer, does for the whole district. The question arises, how the scheme of separation can be introduced in these seventy-five sub-divisions.

There is a class of officers, called Sub-Deputy Collectors, who are generally employed on revenue work, but sometimes perform judicial work and try criminal cases. Some of them are employed at headquarters, while others are sent to important Sub-Divisions to help Sub-Divisional Officers. For many years past the work in Sub-Divisions has been increasing, and the demand for a Sub-Deputy Collector in every Sub-Division in Bengal has been growing also. It has been urged that Sub-Divisional Officers who are mainly employed on judicial work cannot find time to perform their revenue work without help. It has also been urged, with great force, that during the absence of Sub-Divisional Officers on their annual tours Sub-Divisional treasuries have to be closed, much to the inconvenience of the Postal Department, the Civil Justice Department, and all Government Departments, as well as the public. To remove all this inconvenience, and to give the necessary help to Sub-Divisional Officers, it has been urged that a Sub-Deputy Collector should be placed in every Sub-division. This should now be done.

The present number of Sub-Deputy Collectors (excluding

those who are acting in higher capacities) is 97. Allowing for officers on leave, there will still be 75 officers always available for employment in the 75 sub-divisions. And when a Sub-Deputy Collector is thus posted in each sub-division, he can be entrusted with the revenue work of the sub-division, and be subordinate to the District Officer, while the Sub-Divisional Officer will be subordinate to the District Judge.

I make this proposal after a careful consideration of the nature of the revenue work which has to be done in sub-divisions. All important revenue work connected with Land Revenue, Cesses, Income Tax, Certificates, etc., is transacted in the headquarters of the district, and the revenue work of sub-divisions is light and easy. Similarly, the work of control and supervision of the Police Department is done at headquarters, and the Sub-Deputy Collector will have little to do in this line. The treasury work in sub-divisions is light, and is now often done by Sub-Deputy Collectors. On the whole, therefore, I am satisfied that a Sub-Deputy Collector will, under the instructions of the District Officers, be quite competent to manage the revenue and other work of sub-divisions, when the judicial functions have been separated and made over to the Sub-Divisional Officer.

There is only one objection which can be reasonably urged against this scheme. Many Sub-Deputy Collectors are now employed at the headquarters of districts, sometimes on important work, and to take them all away for sub-divisions may be impracticable. Some District Officers may reasonably urge that they require Sub-Deputy Collectors at the district headquarters also, and, where this is satisfactorily shown, the requisition should be complied with. It may be necessary, therefore, to appoint twenty or thirty additional Sub-Deputy Collectors, and this is the only increase to the cost of administration which appears to me necessary for effecting a complete separation between Judicial and Executive functions in Bengal.

Even this additional cost may be met by savings in other departments. Special Deputy Collectors and Sub-Deputy

Collectors are employed on excise work, and their special services are wholly unnecessary in this department. It has always appeared to me, and to many others, that the services of such trained and well-qualified officers are wasted in performing work which does not require officers of their rank. If these officers were withdrawn from the Excise Department, and if the work of that department were included in the general work of the district, as was the case some five years ago, it would probably be unnecessary to appoint additional Sub-Deputy Collectors, as recommended in the last paragraph.

The scheme which has been briefly set forth in the preceding paragraphs is a practicable one, and can be introduced under the present circumstances of Bengal, excluding the backward tracts. I have worked both as Sub-Divisional Officer and as District Officer in many of the districts in Bengal, and I would undertake to introduce the scheme in any Bengal District, and to work it on the lines indicated above.

I have only to add that if the scheme set forth above—with such modifications in details as may be deemed necessary after a careful consideration of it by the Government—be introduced, it will be necessary to recast the Code of Criminal Procedure so as to relieve the District Officer and his subordinates of judicial powers in criminal cases, and to vest them in the District Judge and his subordinates. The police work, the revenue work, and the general executive work can then be performed by the District Officer with care and satisfaction to himself, and also to the greater satisfaction of the people in whose interests he administers the district.

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## III.

*Mr. Romesh Chunder Dutt wrote in* India *for October, 1893* :—

My paper on this subject appeared in the August number of INDIA. The paper has been carefully read by many gentlemen interested in questions of Indian administration, and capable

of forming a proper judgment on such questions. Their opinions will help the public in forming a correct opinion on this very important subject.

The Right Hon. Sir Richard Garth, Q. C., late Chief Justice of Bengal, has given my views his unqualified support from a judicial point of view. As his remarks have already appeared in the August number of INDIA it is unnecessary for me to do more than quote one or two sentences only.

"So far," he says, "as I am capable myself of forming an opinion upon his scheme, I entirely approve of it. It seems to me the most natural and obvious means of separating the two great divisions of labour, the exécutive and the judicial. . . . It seems only in accordance with reason that magistrates who are employed upon executive work should be under the chief executive officer of each district, and that those who are employed in judicial work should be under the chief judicial officer."

These remarks are important, as there is no higher authority on judicial questions concerning Bengal than the late Chief Justice of that province.

In the same way there is no Englishman living who can speak with higher authority on executive and administrative questions concerning Bengal than Mr. Reynolds, late Secretary to the Government of Bengal. He passed his official life in that province, and rose from the lowest appointments in the Civil Service of Bengal to one of the highest. He held charge of some of the most extensive and important districts in Bengal, and performed those combined judicial and executive duties which a district officer in Bengal has to perform. He rose to be Secretary to the Bengal Government, and in that capacity presided over the executive administration of the province. His opinion, therefore, has a unique value and importance.

Mr. Reynolds has suggested one modification to my scheme, and subject to that modification has entirely approved of it. I proposed to contrast sub-deputy collectors with the revenue and executive work of Bengal sub-divisions. Mr. Reynolds thinks

that in the more important sub-divisions a deputy-collector, and not a sub-deputy collector, should be entrusted with these duties. A suggestion coming from such an authority is entitled to respect, and I accept it in its entirety. Let deputy-collectors be employed in the more important sub-divisions to do the revenue and executive work and sub-deputy collectors in the lighter sub-divisions. This modification will require the appointment of twenty or thirty additional deputy-collectors, instead of as many sub-deputy collectors, whose appointment I proposed. Thus modified my scheme has Mr. Reynolds' entire support and approval.

My scheme has been read and approved by other gentlemen, who are still in the Civil Service of Bengal. One of them made to me, independently of Mr. Reynolds, the same suggestion which Mr. Reynolds has made. On the whole, therefore, I believe I am justified in stating that my scheme suggests a practicable way of separating the executive and judicial services in Bengal, without materially adding to the cost of administration.

I have purposely refrained from saying anything on the subject of the existing rules of promotion in the Civil Service. Whether these rules will require modification in some respects after the judicial and executive services have been separated is a matter on which the opinion of the Government of Bengal must be final and conclusive. When I joined the Service in 1871 members of the Service were promoted from the rank of joint-magistrates to be district officers, and from the rank of district officers to the posts of district judges. It may be considered desirable and necessary to revert to this old rule of promotion after the district officers have been relieved of their judicial duties. It may be also considered desirable to rule that an assistant magistrate will be entitled to rise to the rank and the judicial powers of a joint magistrate only after he has served as assistant for a certain number of years. Such a rule will ensure some degree of experience and local knowledge in judicial officers, and will also prevent frequent reversions

from the post of a joint-magistrate to that of assistant. These, however, are matters which can be best considered and decided by the Government of Bengal when the separation of the judicial and executive services has been decided upon. The Bengal Government will find no difficulty in shaping the rules of promotion in the Civil Service according to the exigencies of a just and proper system of administration.

With regard to the details of the administrative arrangements given in my previous paper, no modification except that of Mr. Reynolds has been suggested to me by my friends competent to form a judgment on the subject. I have no doubt that the scheme as modified and supported by the late Secretary to the Government of Bengal will receive the consideration which it deserves from the authorities, both in India and in England.

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## IV.

*Letter (Dated December 8th, 1895) from the Right Hon. Sir Richard Garth, Q.C., late Chief Justice of Bengal, Member of the Privy Council, etc., etc., to the Editor of* "INDIA."

Dear Sir,—I am much obliged to you for the copy which you have been kind enough to send me of what passed at the "interview" with Mr. Manomohan Ghose upon the much vexed question of the unseemly conflict which is still going on in India between the Judicial and Executive Services.

Mr. Ghose's able exposition of the true nature of that conflict and the disgraceful state of things to which it has given rise in Bengal is, I am sorry to say, only too true; and no man is better qualified than he is to deal with this subject, because for the last 25 years he has had a large experience at the Calcutta Bar, and has more especially devoted himself to criminal practice in the Mofussil, so that he has himself been actually engaged in a large number of the cases which he describes, and knows as well as any man the evils of the present system, the grievous injustice to which it is constantly giving rise, and the

utter fallacy of the excuses which are made by the Government for not rectifying this shameful abuse.

The real truth is, as Mr. Ghose tells us, and as Sir Charles Elliott and some other high officials in India are honest enough openly to avow, that the Government of India *approves* this scandalous system, and (whatever the Secretary of State may say to the contrary) would be very sorry to see it altered. In point of fact, if the Government had its will, the independence of the judges would be still further controlled, and the High Courts themselves made subservient to the will of the Executive.

If I may be allowed to make a suggestion, I think that Mr. Ghose's statement, which is thoroughly well considered and deserving of great respect, should be sent to every member of Parliament, both Lords and Commons.

No pains should be spared, in my opinion, in your endeavour to inform Parliament and the British press and public of the true nature of this great question.

I am, etc.,

RICHARD GARTH.

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## V.

*"Interview" (printed in* "INDIA" *for December, 1895) with Mr. Manomohan Ghose.*

The demand for the separation of Judicial and Executive functions has long been urged, not only by the Indian National Congress, but also by Anglo-Indians, without distinction of political party. But the demand still remains unsatisfied, and, indeed, complaints are now frequent in India that the endeavours of the Executive to interfere with the independence of the Judiciary, far from ceasing, are becoming more common and more systematic. It was these complaints (writes a representative of INDIA) that led me to seek an "interview" with the distinguished Calcutta barrister, Mr. Manomohan Ghose, who is at present staying in London with his family. Nobody

•is more amply qualified than Mr. Ghose to express an opinion as to the extent and the gravity of the evil, which has long been condemned in vain. He was the first Hindu from India to be called to the bar in England. He gained this distnction in 1866, at Lincoln's Inn, and since 1867 he has practiced in Calcutta, chiefly, of late, in criminal cases. Mr. Ghose, whose sympathies are with reforms, is a strong supporter of the Indian National Congress. In 1892 he was prevented only by domestic affliction from presiding over its meetings at Allahabad. I found him eager to discuss the burning question of the Judiciary and the Executive. His personal exeperience, as he was careful to explain, is for the most part confined to Bengal. But he has, he added, good reason to believe that his remarks apply generally to the whole of India.

Mr. Ghose replied, of course, to my general question as to the administration of justice in India. that he believed that "justice was never better administered, and that life and property were never more secure in the history of India than they are at the present moment. Even the masses of the people in Bengal with whom I come daily into contact have learnt," he said, "to appreciate the blessings of a pure administration of justice ; and I believe further that the loyalty and contentment of the people in Bengal are mainly due to this appreciation on their part."

"And have they taken kindly to the English system ?" I asked.

"They have taken very kindly to it, and, on the whole, it deals out even justice between man and man. But, unfortunately, there are certain disturbing elements which impair the efficiency of our Courts, and lead at times to gross miscarriages of justice. In civil cases, as between one Indian and another, I may say that justice seldom miscarries, or perhaps it would be more accurate to say that in such cases one seldom hears of any injustice consciously perpetrated by a judge of any grade. No doubt, mistakes are sometimes committed, and even when they cannot be rectified by a higher Court they do not cause nearly so

much mischief as acts of injustice deliberately done, whether willingly or under pressure of some sort. But I regret to say that the course of justice does not always go evenly when racial considerations are involved. In criminal cases, especially, the racial element frequently leads to gross miscarriage of justice. This, however, is an extremely difficult and delicate matter, for which I will not undertake at present to suggest any remedy, beyond expressing a hope that the cultivation of a better feeling between the European and Indian races may lead to an improvement in this respect. But the cause which more frequently leads to miscarriage of justice is one which it is in the power of the Government or the Legislature to rectify if it chooses, and that is the combination of Judicial and Executive functions in one officer."

WANTED: SEPARATION OF JUDICIAL AND EXECUTIVE FUNCTIONS.

"And has not this system been condemned by many eminent authorities?"

"Yes, it has. I have collected the opinions of several eminent Ango-Indian authorities, ranging over a period of nearly forty years, condemning this system and advocating separation. Only recently, in a debate in the House of Lords, upon the Maimansingh case, both Lord Kimberley, then Secretary of State, and Lord Cross, his predecessor, expressed the opinion that it was exceedingly desirable, in the interests of justice, to separate the two functions. But no step, I regret to say, has been seriously taken to effect this separation. Lord Kimberley remarked that financial considerations prevented the Government from introducing this much needed reform. I am sorry that I do not appreciate the force of this objection. As my friend, Mr. Romesh Chunder Dutt, C.I.E., of the Bengal Civil Service, now Commissioner of the Orissa Division, has shown, the reform could be carried out without costing an additional rupee to the State. Although Lord Kimberley had been advised that Sir Richard Garth was wrong in stating that the principal ground of objection to this reform was an

apprehension on the part of Executive officers in India that their prestige would suffer by it, I cannot help saying that, on the contrary, I am convinced, from what I have seen, heard, and read, that Sir Richard Garth was perfectly right in his assertion, and that the financial objection is merely put forward in the present embarrassed state of Indian finances in order to shelve the question."

"Perhaps it would be well, Mr. Ghose, if you would first describe concisely, for the information of English readers, the Indian legal system on its criminal side?"

"Well, I may tell you that, except in the Presidency towns of Calcutta, Madras, and Bombay, where there are Presidency Magistrates, somewhat analogous in position to your Police Magistrates in London, all petty criminal cases are tried by three classes of magistrates in India, known as the first, second, and third-class magistrates. All these magistrates in a district are subordinate to the District Magistrate, who is the chief Executive officer of the district, and who hears appeals from the decisions of second and third-class Magistrates only. Appeals, where they are admissible, from decisions of first-class Magistrates, including those of the District Magistrate himself, lie to District Judge, who is subordinate only to the High Court. As regards the power of these magistrates, I ought to tell you that the first-class Magistrate is competent to award a sentence of two years' rigorous imprisonment (what you call 'hard labour') and a fine of Rs. 1,000; a second-class Magistrate is empowered to inflict six months' rigorous imprisonment and a fine of Rs. 200; and a third-class Magistrate can inflict one month's imprisonment and a fine of Rs. 50. It is the District Magistrate who determines, according to the schedule of offences in the Code of Criminal Procedure, to which class of Magistrate any given case is to be made over. As regards the more henious cases, which, by the Code of Criminal Procedure, cannot be tried by Magistrates, they are committed to the Court of Sessions of the district, where the Sessions Judge tries the case with the aid of two assessors whose opinions he may

or may not follow, or with the aid of a jury whose verdict prevails unless the Judge differs from it and thinks fit to refer the case for the orders of the High Court. The assessors are, in each case, selected by the Judge himself from a list prepared by the Magistrate of the district and by the Judge. The jury are selected by lot out of those summoned to attend on a particular day. The Sessions Judge, otherwise called the District Judge, in all trials has the power of sentencing the accused to transportation for life, or to death. But in the latter case the sentence has to be confirmed by the High Court. I ought to add that the High Court has power to call up and revise the record of all criminal cases, whether the sentence passed is 'appealable' or not, and this power of revision by the High Court is a most important and salutary one, and the very existence of it, even though seldom exercised, except on questions of law, has a wholesome effect upon the entire Judiciary of the country."

"Am I right in saying that at present the most important question which affects the whole administration of criminal justice in India has to do with endeavours on the part of the Government to make the Judiciary practically subservient to the Executive?"

"Yes, you are quite right. There has been for some time past in Bengal a tendency to force the Judiciary to decide criminal cases according to the preconceived ideas of the Executive, and this tendency, I am sorry to find, has gone so far as to lead the local Government to assert the right of criticising the judgment even of the Judges of the High Court, who are in no way subordinate to the Local Government. As regards the Judges and the Magistrates in the interior, attempts have been made in various ways in recent years to put pressure upon them to make their decisions accord with the views entertained by the Executive. The Executive are naturally anxious that no slur should be cast upon the police by Judges and Magistrates and, with that view, of late years, the Executive officers in Bengal have had recourse to various methods, all tending to interfere with the judicial independence of Judges and Magistrates."

"Will you tell me what those methods are?"

"In the olden days the Executive were in the habit of loyally accepting the decisions of judicial tribunals. But within the last twenty years there has been a manifest tendency to put pressure upon our judicial tribunals to decide cases in accordance with the wishes of the Executive. This pressure is frequently put in an indirect way. Judges and Magistrates have to look up to the Executive for promotion and preferment and if their decisions are subjected to criticism by the Executive such as the Magistrate of the district, the Commissioner of the division, or an Under-Secretary to the Government, it must impair the feeling of independence which every judicial officer ought to possess. This is not, however, the only way in which the judicial independence of our officers is threatened. A Deputy-Magistrate has to depend entirely upon the District Magistrate for his promotion. The District Magistrate combines in himself Executive and Judicial functions. In his Executive capacity—often on an *ex parte* hearing—he comes to the conclusion, for example, that a certain person is obstructive and ought to be criminally punished, should an opportunity for punishing him offer itself. Such an opportunity may, in Bengal, occur at any moment. When a case does occur in which that unfortunate man is involved, the District Magistrate will probably, for fear of an application to the High Court for a transfer from his file, or for the purpose of showing apparent impartiality, refrain from trying it himself, but will make it over to a subordinate Deputy-Magistrate with an expression of opinion—more frequently verbal than in writing—that the man ought to be convicted. The Deputy-Magistrate, who is naturally anxious to be in the good books of the District Magistrate, has not often the courage to acquit the man, even if he should judicially come to the conclusion that the man ought to be acquitted. I remember a case in which I moved for a transfer of a criminal case from a Deputy-Megistrate's file, on the ground that the District Magistrate had written a letter to

his deputy suggesting that the *maximum* sentence should be given to the prisoner. I secured the transfer because my client was lucky enough to have obtained a copy of the letter. Such instances are, I believe, of almost daily occurrence, but many of them do not see the light of day ; and if the suggestions or instructions are verbal, they cannot be proved."

"How, then, do you know that they are given ?"

"Many Deputy-Magistrates who are my personal friends have frequently complained that they are subject to this kind of interference, and that they have had quietly to submit to it. Whenever I have succeeded in exposing a District Magistrate who has acted in this way, it has been said on his behalf—sometimes even by High Court Judges from the bench—that this was inevitable by reason of the combination of Judicial and Executive functions in the person of the Magistrate. I know of many instances in which what are called demi-official 'chits' in India have been sent by the District Magistrate during the progress of a case to a subordinate Magistrate engaged in trying it, telling him how to proceed in matters which are purely judicial."

"And what are demi-official 'chits' ?"

"By demi-official 'chits' I mean slips of paper sent officially but privately, and these do not form part of the record of a case, nor are they accessible to the Appellate Court or to the parties. I have known instances in which District Magistrates have openly asserted the right to give any advice they think proper to their subordinate Magistrates engaged in trying cases. In one notable instance a covenanted English Magistrate openly told me in Court that he would consult the District Magistrate, who was practically the prosecutor in the case, as to a particular matter which he was then called upon to decide judicially. This he said with great simplicity, and apparently without even knowing that it was in any way objectionable to be advised by the prosecutor in the case. This is how, ordinarily, the independence of subordinate Magistrates is interfered with. The practice has to my knowledge existed, so far as the subordinate

Magistrates are concerned, during the last thirty years. The Commissioner of the Division, who is a purely Executive Officer above the District Magistrate, also asserts and exercises the right of censuring Magistrates as regards their judicial work."

"Can you give me an instance ?"

"Oh, yes ; I remember a well-known case in which a Deputy-Magistrate showed me an autograph private letter, written to him by the Commissioner of the Division, in which the latter officer expressed disapprobation of a particular judgment which the Magistrate had delivered, and in which he further went on to say that in consequence of that judgment the Lieutenant-Governor had stopped the Magistrate's future promotion for a term of years. The Deputy-Magistrate showed me the letter with fear and trepidation, and begged me not to make any use of it, adding 'see how unfortunate I am. The Government treats me in this way, although my judgment has, on revision, been affirmed by the High Court.' This state of things must, I fear, continue so long as the chief Executive officer of the district continues to exercise appellate as well as revisional powers over subordinate Magistrates. The District Officer, who is in constant private and official communication with the Superintendent of Police, is often influenced one way by the *ex parte* representations and reports of the police, while the subordinate Magistrate who hears the evidence and deals judicially with the case, forms an opinion the other way ; and it is not every officer who has, under these circumstances, the strength of mind to resist the temptation of surrendering his own judgment to that of his official superior whose approbation it is his interest to seek."

"Can you give me a typical instance of the evil of which you complain ?"

" I can give you from my own experience numerous cases which have come under my notice ; but I will select, for the present, only one case, which occurred during the administration of the present Lieutenant-Governor of Bengal, Sir Charles Elliott. It will show the extent to which even the Government

may go in this respect. A few years ago I was called upon to defend two Bengali gentlemen who had been charged by the police with assaulting them in the execution of their duty. They had, on the other hand, complained against the police for having grossly assaulted and maltreated them without any cause. The case brought by the police was heard by a magistrate in whose court I was able to show conclusively that the charge preferred by the police was utterly false and supported by fabricated evidence. Before the Magistrate had delivered his judgment, the policeman who was the complainant came to me and confessed to me that he had been put up to prefer a false charge by his superior officers. He said that he was extremely sorry for what he had done, and begged me to withdraw the counter-charge which my clients had brought against him. I told him that I could not advise him as to what to do in such a matter, but that he should be guided by the advice of his official superiors. He and his official superior then came to me, and expressed their readiness to apologise to my clients for what the police had done. Acting under my advice, my clients withdrew the charge against the police on receipt of an apology by the policeman concerned. But, before this, the Magistrate had acquitted my clients and declared that the case against them was false. Shortly afterwards, the head of the police department, knowing nothing of the confession and the apology on the part of the offending policemen, made a report against the Magistrate to the Government, and prayed that the case against my clients might be re-opened, as the Magistrate had improperly acquitted them. The Government of Bengal found it impossible to re-open the case in any way, although it had the power under the law to appeal against the acquittal to the High Court. But, instead of proceeding in the only way the law allowed, a Secretary to the Government sent for the Magistrate and expressed to him the grave disapprobation of the Lieutenant-Governor for the judgment he had delivered. When the Magistrate declared that he had acted to the best of his judgment according to the evidence, the Secretary,

I am told, remarked, 'You ought to have thrown the responsibility of acquitting the men on the Appellate Court !' My authority for this communication is the Magistrate himself. Recently, a circular has been issued by some Magistrates—I believe, with the full approval of Sir C. Elliott—in which subordinate Magistrates are requested not to comment adversely in their judgments upon the conduct of the police concerned in any case, but to report their conduct departmentally. I need hardly add that this amounts to direct interference with the independence of subordinate Magistrates."

THE DISTRICT JUDGES.

"But how about the District Judges? Are not they as a body independent, and do they not enjoy the confidence of the people?"

"I am glad to say that the District Judges as a body are able and conscientious men, and try to do their work according to their lights. This is partly due to the fact that they are practically independent of all executive control. Their work is subject to revision only by the High Court. But of late years the Government of Bengal has been indirectly trying to interfere with their independence also. There is nobody to send demi-official 'chits' to *them*, but recently several judges have privately complained to me that they have found it very difficult to maintain their independence by reason of the treatment they have received from Executive officers and from the Bengal Government. One of them—an English Judge—highly respected in Bengal as an able, conscientious and independent gentleman told me not long ago that he had made up his mind to retire from the Service, chiefly because he had found it very unpleasant to perform his duty conscientiously and with independence. And he has now, quite recently, retired. I believe that this is not a solitary instance in which an English Judge has retired for this reason."

"But in what way, exactly, does the Government interfere with the independence of these District Judges?"

"A judge whose verdict or whose decision does not meet

with the approval of the District Magistrate is privately reported against to the Government—it may be through the Commissioner of the Division—and the Government has the power of transfering him to an unhealthy station, or of delaying his promotion."

"Can you give me an instance in which this has been done?"

"I can only speak of the general feeling on the subject, as the reasons for such transfers are not, of course, publicly announced. But I can give you one instance of a very remarkable character which convinces me that there is a good deal of foundation for this feeling. Not long ago the *Indian Mirror* published an anonymous letter in which the writer gave it as a rumour that a well-known and independent Judge of the Civil Service had been recommended by one of Sir Charles Elliott's Secretaries for a transfer to Noakhali or some such unhealthy district. The writer professed to give the recommendation of the Secretary, together with the remarks of the Lieutenant-Governor himself. The letter was treated by me, as well as by most people, as a hoax. But to my great surprise a few days after the letter had appeared, the editor of the *Indian Mirror* came to see me with a communication from the Chief Secretary to the Government of Bengal threatening him with a prosecution under the Official Secrets Act for having given publicity to this anonymous letter—which manifestly, therefore, according to the Government of Bengal, did contain an official secret. It is scarcely necessary to add that, under my advice, the editor replied that the Official Secrets Act had no possible application to the circumstances of the case, even if the information contained in the letter was true. We heard nothing further of this prosecution. But I may remark that, inasmuch as the editor was charged by the Government of Bengal in that letter with being in league with somebody in the Government Secretariat—a charge which the editor indignantly denied—the inference is irresistible that, after all, the information given by the anonymous writer had some basis of fact."

THE JUDGES OF THE HIGH COURT.

"But how about the Judges of the High Court? Are they not generally independent of the Executive, and do they not command the confidence of the people?"

"I may say that there is no institution in the country which commands greater respect and confidence from the people than the High Court, and that is because, as a body, the Judges are thoroughly independent and conscientious. Those selected from England—viz., Barrister Judges—are deserving of special mention in this respect, because they are not swayed by prejudices which a long residence in India is apt to foster. As regards the Civilian Judges of the High Court, I think it my duty to mention also that I have come across Judges who in respect of thorough impartiality and independence would bear comparison with the best Judges in England. But this depends very much upon the class of men who are selected from the Civil Service. I regret to say that there have been men selected from the Civil Service who have, by reason of their tendency to please the Executive, failed to come up to the mark. But they are quite the exception. The Judges of the High Court are, I am sorry to say, not looked upon with much favour by the magistracy under them, and the reason of that is not far to seek. The Magistrates in the interior are frequently apt, by reason of Executive influence, to deliver judgments not only opposed to law, but not supported by the evidence in the case. No wonder, therefore, that the High Court Judges, uninfluenced by Executive considerations, feel it their duty to reverse such judgments, and they thereby cause dissatisfaction among the magistracy, who, whenever their decisions are reversed, have a tendency to consider their 'prestige' utterly gone."

"But has the Executive in any way ever attempted to influence the Judges of the High Court?"

"I am sorry to say that I myself could give instances of some such attempts; but, except in rare instances, they have never been successful, because our High Court Judges, although holding office during the pleasure of the Crown are

practically not in any way under the control of the Government."

"Has there ever been any friction between the Local Government and the High Court ?"

"Yes, the whole thing culminated not long ago in a dispute between the Judges and Sir Charles Elliott, who has always declared himself opposed to any separation of Judicial and Executive functions in India. He has been more opposed to this reform than any Lieutenant-Governor I can think of. A few years ago he asserted the right of sitting in judgment upon the judicial work of the Judiciary in Bengal, and this led to a controversy between him and the Judges. The Judges in a body, with one exception, protested against the attitude assumed by Sir Charles Elliott, and the whole matter was referred to the Secretary of State for his decision. It is a matter of the deepest regret to us that Lord Kimberley, instead of vindicating the independence of our Judges, practically shirked the whole question. Such an unseemly conflict between the High Court and the Executive, resulting in so unsatisfactory a manner, is not calculated to enhance the respect which the public ought to have for Her Majesty's Judges. Much depends upon the class of men raised to the High Court Bench. The High Court alone, in my opinion, ought to have the power of nominating Civilian Judges for seats in that Court, and the Barrister Judges should, as a rule, be sent out from England ; not because there are not competent men in our Bar, but because there is great danger of mediocre and weak men being selected in India as being what are commonly called by the Executive 'safe' men. I say this notwithstanding the fact that recently we have had two excellent and thoroughly independent Judges from our own Bar."

"Do you think the policy pursued by Sir Charles Elliott is likely to be discontinued on his approaching retirement ?"

"He would probably have retired as a popular Governor from Bengal if he had not made shipwreck by reason of the policy of which I complain, and of which he is such a strong

advocate. His successor, Sir Alexander Mackenzie, knows Bengal well, and the feeling of the people there on this subject. He is generally credited with sympathy for the people of Bengal, and I have no doubt he will steer clear of the rock upon which his predecessor, known to be a very able man, has made such a sad shipwreck."

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## VI.

*Statement (dated December, 1895) by Sir John Budd Phear, Judge of the High Court, Calcutta, 1864-1876, Chief Justice of Ceylon, 1876-79, etc., etc.*

You have done a great public service by publishing the details of your "interview" with Mr. Manomohan Ghose upon the above topic. This gentleman, by reason of his near upon thirty years' experience in the active and, I may add, eminently successful practice of his profession in the High Court of Calcutta, as well as in the local courts throughout the Presidency of Bengal, is peculiarly entitled to be listened to when he speaks upon the important subject with which the "interview" deals. And apart from this, his English education, his long familiarity and, indeed, identification with highly cultured English society and its ways of life, and his unquestioned sympathy with and loyalty to British rule in India combine to give especial weight and value to his utterances on behalf of his countrymen in this matter.

It is deplorable to perceive from Mr. Ghose's statement that there still lurks in influential quarters an indisposition to recognise the extreme importance, especially under the circumstances of our rule in India, of keeping the Judicial and Executive functions, so far as practicable, apart. I had imagined that all question on this point had been set at rest, so far as the expression of authoritative opinion could operate, at least a quarter of a century ago, and that financial and Service difficulties alone have hitherto hindered the full attainment of the desired reform.

It fell to me after leaving India, and when largely respon-

sible for the administration of justice in Ceylon, to advise the Government of that colony upon the working of the local Courts of justice under a system of mixed functions analogous to that of India; and to indicate with some closeness of examination the serious evils which inevitably result from the Judicial inefficiency incidental to such a system, and, of which, it may be mentioned, not the least is a vicious use of civil and criminal proceedings, so often supposed by Englishmen to be characteristic of Oriental peoples, but more properly attributable to the infirmity and misunderstood attitude of the Courts themselves.

I do not, of course, ask you to burden your columns with material drawn from this source; but I may perhaps be allowed to add that the European planters in Ceylon, a very influential portion of the community and deeply interested in the efficiency of the local Courts, have recently, as I am informed, pressed the Government for a reform of the Judicial system with express reference to the grounds disclosed in this official communication.

The second head of Mr. Ghose's complaint is even more to be regretted than the first. That there should be any such persistent endeavours on the part of any Government of British training to make the Judiciary practically subservient to the Executive as Mr. Ghose represents to have lately been manifested in Bengal, is difficult to believe—not that incentives to such an endeavour are inconceivable, but that to yield to these would be symptomatic of a lower order of statesmanship than one would like to attribute to one of the subordinate Governments of India. There may be, and probably are, local officials who think that the prestige of the Executive, as they understand it, must be maintained at any cost and at whatever hazard; but all should by this time know that the true strength of the British rule in India consists in the approach which it makes to the unbiassed administration of justice by the civil and criminal Courts, not merely as between private persons, but also between private persons of all classes and the Government; and that the surest way of upholding the prestige of the exe-

cutive in the eyes of the people and securing its efficiency is to make it the visible supporter of an independent, impartial and competent Judiciary. A step in the opposite direction is but a source of weakness to the Executive itself. This lesson has been written for us in almost every page of our own history, and I feel pretty confident that Sir Charles Elliott's successor is not one to disregard it.

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## VII.

*Statement (dated December 24th, 1895) by Sir William Markby, late Judge of the High Court, Calcutta, Reader in Indian Law in the University Oxford, etc.*

I have read Mr. Monomohan Ghose's memorandum with attention, and it only confirms the view which I have always held, and which is, I should suppose, held by everyone who has had any experience in the administration of justice, that the union in the same person of Judicial and Executive functions always leads to injustice.

In Mr. Ghose's memorandum, matters are touched upon which do not quite strictly belong to this subject. But the evil, I take it, upon which he desires to mainly insist, and which he desires to see remedied, is this : That Magistrates who are responsible for the peace of a district, whose duty it is to initiate criminal proceedings, and who are, in fact, virtually police officers, also exercise large and preponderating Judicial powers in the same district.

That Magistrates should have failed to exercise satisfactorily functions so entirely opposed to each other as those of policeman and Judge is not at all surprising. It would have been a miracle had it been otherwise. The zeal in procuring a conviction which is the first duty of a policeman is absolutely inconsistent with the impartiality of a Judge.

That there are miscarriages of justice arising from this unfortunate union of functions, and that these miscarriages of justice do great harm as tending to shake the confidence

of the people in the administration of justice itself, I have no doubt whatever.

I would, therefore, gladly see the Magistrates of all grades relieved entirely of all duties other than those which are purely Judicial, and also see them made responsible for the performance of their Judicial duties to the Sessions Judge and to the High Court, and not in any way to the District Magistrate or to the Commissioner.

Such a change would save many of the evils suggested by the memorandum of Mr. Ghose, and, as it only involves a transfer of functions without any increase of work, I cannot see why it should involve any increase of expenditure.

If there is any reason to suppose that the system might be ineffectual for the repression of crime it might be tried as an experiment in one of the districts adjoining Calcutta. It seems hardly likely that a system which succeeds perfectly well in that city would be a failure if tried in the immediate neighbourhood.

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## VIII.

*Statement (dated January 7th, 1896) by the Right Hon. Lord Hobhouse, Legal Member of the Viceroy's Council 1872-77, Member of the Judicial Committee of the Privy Council, etc., etc., etc.*

I have received the papers you send for the purpose of effecting further separation between purely Executive or Administrative functions on the one hand and Judicial ones on the other.

I have been for many years detached from Indian affairs, and cannot speak with confidence, or even with accuracy, on points of internal government, which must turn on details. I do not even know whether such changes as have been made in the Civil Service since the Criminal Procedure Code of 1872 or the Civil Procedure Code of 1877, or, indeed, whether the working of those Codes, and of the Courts Acts which dovetail

with them, have tended in the direction of further separation or the contrary. So far as your general aims and objects go, you have my strong sympathy. I have, however, nothing to say except generalities which I uttered many times in speech and writing since my return from India in 1877. It has always seemed to me that the substitution of a fixed impersonal Law for the personal views of the ruler for the time being and in the particular case, is one of the most important advances in good government that can be made in any country ; and, again, that this advantage cannot be secured unless the law is declared by a separate staff of functionaries. How far the separation shall be carried, so as to secure the utmost amount of independence in the Judiciary that is consistent with the unity and stability of government, is a question of statesmanship depending on the condition of the country. I believe that under Asiatic rulers the principle of independence was so merged in that of unity as to be very weak, even if perceptible. And I have always claimed for our countrymen that we have either introduced it, or made it a living thing. In the course of my work as Law Member of Council, I held many conversations and discussions with Bengal zemindars and with nobles and landholders in other parts of India, and, rightly or wrongly, I came to the belief that they had grasped the principle of judicial independence firmly, and put a true value upon it, and looked on it as a great safeguard. And, in answer to the common superficial sneer about our beer-bottles, I have said, among other things, that if we were separated from India we should leave an active and working conception of Law, which did not exist before our time, and which is one of the most potent contributions to the framework of a nation.

I do not know whether my colleagues took such strong views as I as to the value of an independent Judiciary ; nor do I think that any event in my time called for its discussion in a crucial shape, such as brings out conflicts of opinion. But it was, I think, generally assumed to be good, except for very backward and primitive parts of India ; and the objections to making it

more complete were mainly on the score of expense. In fact, as regards civil suits, where the litigants bear the expense in the shape of court fees, the separation is perhaps as fully effected as need be ; and I understand that your present demand is not grounded on any mischief felt in civil suits. With regard to criminal proceedings, I think the general view among high officials was—it certainly was mine—that more ought to be done when the means were forthcoming. I gather from your papers that contrary views are now in the ascendant.

These geneal views are all that I can express. It is a very long way to descend from them to particulars, and to say that the circumstances of the day not only demand but render possible a further extension of independent Judiciary. I think it likely, and you have my hearty sympathy with your aims. But beyond that, and it is very little, I cannot help you.

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## IX.

*Statement (dated January 13th, 1896) by Sir Raymond West, late Judge of the High Court, Bombay, etc.*

I am keenly alive to the disadvantages that arise from the combination of Executive and Magisterial functions. We should not get rid of all difficulties or secure absolutely perfect justice by a severance of the duties, but we should remove many temptations to abuse, which may not always be overcome, and many grounds for suspicion and misrepresentation. Ten years ago, or thereabouts, I wrote a letter to Lord Dufferin, in which I insisted on the necessity for a gradual reform, and pointed out how, in my opinion, it could be effected. He sent me a courteous and appreciative answer, but nothing was done. The Government, strongly Executive in feeling, are no doubt wholly opposed to a change, which they think would weaken the hands of the general administration. They are conscious themselves of a strong desire for the people's welfare, and not without reason credit the local officers with similar wishes. But seeing certain material conveniences in

the present system, and naturally loving what is called strong government, they ignore the underlying moral weakness of the system—its incapacity to command complete respect and confidence.

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## X.

*Statement (dated January 14th, 1896) by the Right Hon. Sir Richard Couch, Chief Justice of Bengal 1870-75, Member of the Judicial Committee of the Privy Council, etc., etc.*

I am obliged to you for sending me the January number of your journal, "INDIA," and the print of the "interview" with Mr. Manomohan Ghose. The latter discloses a state of things which certainly ought not to exist. Judicial and Executive authority and functions are incompatible. It is essential to the proper administration of justice that the Judicial officers of the Government should not be subject to such a trial of the independence and sense of duty as appears there. The facts stated by Mr. Ghose have mostly occurred during the last twenty years, when I had ceased to hold any Judicial office in India, and I cannot from my own knowledge give any opinion upon the action of the Executive officers during that time. Mr. Ghose says: "In the olden days the Executive were in the habit of loyally accepting the decisions of judicial tribunals." This, according to my recollection, agrees with my experience in India. "But," he continues, "within the last twenty years there has been a manifest tendency to put pressure upon our Judicial tribunals to decide cases according to the wishes of the Executive." As regards this, I am unable to believe with Sir Richard Garth that the Government of India approves it and would be sorry to see it altered. I think every practicable effort to preserve the independence of the Judicial tribunals in India should be made, and trust that your proposed publication of Mr. Ghose's paper and a subsequent representation to the India Office will have due effect.

## XI.

*Statement (dated January 14th, 1896) by Sir Robert T. Reid, Q.C., M.P., Attorney-General 1894-5, etc., etc.*

I do not know in detail the manner in which or the extent to which Judicial and Executive duties are discharged in India by the same persons, and therefore I could not without much more information than I at present possess offer any criticism upon your scheme.

But I certainly consider that it is most unadvisable in any country for the same person to act as a Judge and as an officer of the Executive Government. However scrupulous and careful a man may be, it must be very difficult at times to reconcile such different functions; and in case of abuse of power the evil consequences of such a dual authority might be incalculable. The thing is not allowed in England, and every man who has read history ought to hope that it will disappear in India.

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## XII.

*Article (printed in the* "ASIATIC QUARTERLY REVIEW" *for October, 1896) by Sir Charles A. Elliott, K.C.S.I. (late Lieutenant-Governor of Bengal.*

The combination of Judicial and Executive powers in the hands of the District Magistrate in India has long been attacked in certain quarters, and has of late been pushed into the forefront and become rather a burning question. The abolition of this system is a leading plank in the platform of the National Congress Party. Their views have been not unfavourably noticed by Lords Cross and Kimberly, the latter of whom is reported to have said that the chief reason for not accepting the change proposed is that it would entail great additional expense. It formed the leading subject in Mr. Bhownaggree's speech in the Indian Budget Debate of August 13th; and it supplied material for an address read by Mr. Manomohan Ghose before the East India Association and published in the January number of this Review under the

question-begging title of "The necessity of maintaining the independence of the Judiciary in India." I shall attempt to show that the existing system has great merits and advantages, that it in no way trenches on the judicial independence of the Subordinate Magistrates, that there are weighty arguments against its modification besides those which arise from financial considerations, and that no valid proof has been adduced of any evil arising from it.

In the first place then I would point out that the keynote to our success in Indian Administration has been the adoption of the Oriental view that all power should be collected into the hands of a single official, so that the people of the District should be able to look up to one man in whom the various branches of authority are centred and who is the visible representative of Government. The English Idea of distributing power to a series of officials or bodies, to Petty Sessions and Quarter Sessions, Vestries and Boards and Councils, is very far from the Indian ideal which more resembles the Continental system than ours, since the District Magistrate corresponds more closely to the Préfet of a French Department than to any official in England. The tendency to differentiate and to subdivide exists in India as elsewhere, and is supported by the usual argument that the man who has only one work to do will do it better than the man who has several, but it has always been checked by the rulers who best understood the wants of the country. The Police Department, the Engineer Department, the Forest Department, the Education Department, the Sanitation Department, have all, as they grew up, tried to shake themselves free of the District Magistrate, but have been replaced in their proper position by such Lieutenant-Governors as Sir G. Campbell in Bengal and Sir John Strachey in the North-West-Provinces—not so as to cripple the power of the experts in each Department, but so as to collect all the threads of government in the District Magistrate's hands, enabling him thus to use the knowledge of all for the purposes of each. In Judicial matters the more res-

ponsible duties of Sessions Trials, and the technical work of Civil Justice have been placed in the hands of the Judge ; but there still remains under the District Magistrate's orders the body of Subordinate Magistrates who dispose of the simple criminal cases and commit the graver to the Sessions, and the reasons which have been stated above apply with great force to the retention of their subordination. I cannot do better than quote here an extract from Sir John Strachey's "India,"* which bears upon the subject, and I quote it with the greater readiness because Sir John's authority is quoted by Mr. Manomohan Ghose on the opposite side :

"We often hear demands for the more complete separation of Executive and Judicial functions in India, but they are demands based on the assumption that because this is good for England it is good for India also. There could be no greater error. The first necessity of good administration in India is that it should be strong, and it cannot be strong without the concentration of authority. In the everyday internal administration there is no office so important as that of the Magistrate and Collector. He is one of the mainstays of our dominion, and few steps could be taken in India which would be more mischievous and dangerous than to deprive him of those powers which alone enable him to maintain his position as the local representative of Government."

The Congress Party, and Mr. Manomohan Ghose with them, have always preferred to use general and *ad captandum* phrases, like "the maintenance of Judicial independence" rather than to specify what it precisely is that they aim at. It is necessary, therefore, to explain that I understand them to object to two items in the District Magistrate's position ; one is, that he, being the Executive Head of the District, with direct control of the Police, has the power of trying cases himself ; the other, that the Subordinate Magistrates who try the great majority of cases are directly under him,

* Chap. XX., p. 287, 2nd Edition.

receive orders from him, and look to him for such reports on their conduct and capacity as may expedite their promotion.

With regard to the first item, the District Magistrate does, as a matter of fact, try so few cases that no very serious evil would ensue if he did not possess the power. There are many districts in Bengal in which he does not try twelve cases in a year. Still there are some classes of offences such as those committed by Europeans, which, under the law, a native Subordinate Magistrate cannot try, and there are political *causes célèbres* in which a native might be suspected of bias or of weakness. On account of these it is well that he should retain this power; and it is occasionally useful that he should take up an important and difficult case to set an example to his subordinates of the proper way of dealing with it. Even if these reasons did not exist, I should strongly oppose the abandonment of this power in deference to the argument that it is likely to be misused. The opponents of the system draw the picture of an officer, who, because he has to some extent supervise and guide the police operations which end in the arrest of an accused person, becomes so biassed that he is unable to weigh aright the evidence which is produced on the trial. No doubt such persons may exist, but I do not believe that the picture is true to average human nature. There is no real distinction in kind between the action taken before and after the trial. The Police Officer is exercising a sort of judicial capacity when he decides whose story he shall believe and which of two clues he shall follow up; the Magistrate exercises a similiar capacity when he believes or disbelieves the witnesses who appear before him on the Bench. To say that weak evidence will seem strong to him because he heard it before the trial, or that he cannot appreciate the force of new evidence because he did not hear it before, is unwarranted; to say that he will be so possessed by the passion of the hunter as to be incapable of listening fairly to any evidence in favour of the hunted, is a hypothesis unjustified by general experience or by knowledge of any but the worst sides of human nature.

The more important item of the District Magistrate's power consists in his control over the subordinate Magistrates, and it is this which is attacked on the plea that he uses or may use this control to affect their "judicial independence." Of course, I fully agree that any such interference would be unjustifiable, but I maintain that such cases, if they have occurred, have been most exceptional, and that there is too much good sense and honourable feeling among the District Magistrates to allow any danger of the sort to exist. It is universally accepted that though a Magistrate has power to refer particular trials to particular officers, he has no right whatever to interfere with their judicial disposal of the case when so referred, but must leave it absolutely to their discretion. But it is obvious to those who know the facts that there are many ways in which control may be exercised and be required without touching judicial independence at all. The Subordinate Magistrates in Bengal comprise a large body of about three hundred men, who begin their service very young, and continue in it rising from grade to grade by merit and seniority, throughout their life. For the younger members it is most important to receive guidance and counsel at the Magistrate's hands to preserve them from the many faults into which they are liable to fall; and even the Seniors may often benefit by such advice.

The faults to which I refer are such as these—want of sense of proportion in sentences; inclination to procrastinate and to postpone case: want of care in ascertaining at the first outset what a complainant wants and what evidence he professes to be able to produce; a tendency to override or to let oneself to be overriden by the local bar; prolixity in judgments; and so forth. It was with a view to such matters that I ordered every District Magistrate in Bengal to send for and read over six cases *decided* by each of his subordinates monthly, in order to notice and warn them against irregularities and the growth of bad habits. That anyone should say to a Subordinate "I consider this man guilty and you must decide him to be

so" would be monstrous, but though interference with judicial independence is talked of, no one has asserted that interference of this kind takes place. On the other hand, it would be dangerous to place young and inexperienced men in positions of authority if there were no check over them but the possible reversal of their orders some months afterwards by the Appellate Court, and it is the greatest possible benefit to them to receive advice from a senior and friendly official in such matters as those I have referred to. What alternative is suggested by those who oppose the system? They hold that the only control should be that of the Judge who hears the case in appeal. But only one case in a hundred may come up in appeal, and then the mischief may be done and the bad habit formed and hard to eradicate. In this as in other cases, prevention is better than cure.

These Subordinate Magistrates have also Executive and Revenue work to perform. In every district there is, besides magisterial work, a variety of other duties, such as the charge of the Treasury, of the Record Room, of the process-serving Establishment, of Excise, of Registration, of Income Tax, the collection of the Land Revenue and Local Cesses, Settlement, and so forth. The practice is either to give to each Subordinate some magisterial work as well as some one or more of these charges—or to confine one or two (where possible) to criminal work, and give the revenue and other duties to the rest. The latter alternative has been put forward by Mr. Romesh Chandra Dutt as the solution of the problem before us, but it is only possible in districts where there are four or more Subordinates: obviously it cannot be adopted where the number is three, and in the case of two it is unlikely that the two classes of work would be so exactly equal that one class could be given wholly to one man and one to another. At any rate it can be done in the case of less than half the districts in Bengal, and during the last two years the point has been much discussed as to which of the two modes of distribution is preferable. The best officers were found to be

divided in opinion. On the one side, it is advantageous that there should be two Courts always sitting, so that the Police and the parties should know where to go to, and should not have to follow the Magistrate about when he is on tour. On the other hand, the monotony of trying nothing but criminal cases is wearisome, and officers prefer a more varied class of work; judicial business ebbs and flows, one day there is a flood of cases for trial, and another day a dearth, so that unless vacant hours can be filled up with miscellaneous and Revenue work, the time of the magisterial officers is not fully employed; those who are set aside for revenue business find that when their turn come to take up criminal work they have grown rusty in the technicalities of the Procedure Code. In India we want good all-round men, not experts in technical minutiæ nor *homines unius libri*. On these grounds many of the best District Magistrates oppose the system of making a sharp separation between those who carry on judicial work and those who do not, and on the whole I agree with them in thinking that it is not conducive to the highest administrative efficiency.

However this may be, the kind of separation of work which I have discussed here would not satisfy the opponents of the existing system. They require not only that certain Deputy Magistrates should be set apart exclusively to try criminal cases, but that they should be permanently set apart and should form a distinct body or branch of the Service, ceasing to be subordinate to the District Magistrate and being placed under the Judge and the High Court. Those who urge this change have lost sight of the paramount importance of inspection as a stimulus to the correct performance of duty. The Judge is not a peripatetic officer and the District Magistrate is; the Judge is tied to the Bench, the District Magistrate is not; the Judge is constantly employed in the hearing of Sessions' trials, civil cases, and appeals, and has not the leisure to inspect. With the Magistrate, inspection is the breath of his nostrils, and the success of the system of concentrating power in his

hands is chiefly due to this that he does not do the work himself, but sees that others do it. However excellent the native officials are, they have a general tendency to grow careless and slovenly in the minor and routine branches of work, and the only remedy for this is the knowledge that they are liable to be inspected and that the eye of a superior is on them. If the Judge were substituted for the District Magistrate there would be an end of that training of the junior subordinates and that steady supervision of the seniors which I have described as one of the chief duties of the Magistrate, and we should substitute for them only the liability to be corrected in appeal by the Judge and the High Court. I feel sure that this would be a severe blow to the efficiency of the Subordinate Magistrates, and to the confidence which the people feel in the administration of justice.

It will be seen that I base my support of the existing system, not on a vague term like prestige, but on two definite propositions: first; that the District Magistrate who is the eye and ear of Government, should hold in his hands all the threads of the different branches of the Administration, and should have the officials in all those branches under his general control: second; that the Subordinate Magistrates derive great benefit from the advice and guidance of an experienced senior when they are young, and from the inspection of a peripatetic officer whether they are young or old, and that the substitution of the control of the Judge for that of the District Magistrate would defeat these ends. The financial argument has been put so much in evidence by others that it is not necessary for me to dwell much upon it; it is enough to say here that in all but the largest districts it would necessitate a considerable increase of the existing staff of Subordinate Magistrates and their establishments, and it would lead to a great expansion in the number of District Judges.

In dealing with the views of those who advocate change of system, we must put aside all vague and general talk about the distinction between judicial and executive authority, such

as Mr. Bhownaggree, for instance, indulged in during the debate of August 13th, since this principle in the abstract has been accepted in the case of the Judges who are purely judicial officers, and in the Police Act of 1861 ; and we must tie our opponents strictly down to the two points which I have indicated—the District Magisrtate's power to try cases himself, and his control over the Subordinate Magistrates. A great deal that has been said is irrelevant to these points, and what is relevant confines itself to such remarks as this of Mr. Bhownaggree, that "preconceived notions in regard to their judicial functions are attributed to the Subordinate Magistrates by the public," and to specify statements regarding the misuse of their powers by District Magistrates on certain specified occasions. Some of these statements are contained in the paper by Mr. Manomohan Ghose which I mentioned in the beginning of this article, and a larger number (twenty in all) are described at length in a Memorandum (dated 15th July, 1896) drawn up by him and printed in Calcutta, but not, so far as I am aware, published there or in England. It was circulated, I am told, to those Members of Parliament who were thought likely to agree in its views, but not to all ; but it was referred to by Mr. Bhownaggree in his speech of August 13th, as an authoritative document, so that it is not, apparently, unfair to treat it as public property and to criticise it in this place.

I propose to deal first with the cases related in the Article in this Review,* and afterwards with the additional ones set out in the Memorandum. The Article contains a good deal of vague assertion, such as "the people say we cannot get justice," an assertion which can neither be proved nor disproved, but which is opposed to the experience of almost every careful and unprejudiced observer who has visited or resided in India. Besides declamation of this kind there are three stories related which purport to represent instances of actual injustice and evil caused by the combina-

* January, 1896.

tion of judicial and executive powers in the hands of the District Magistrate.

The first of these is the story of a Deputy Magistrate who was trying a case and who said to Mr. Manomohan Ghose that he must do so, and so because he had received instruction to that effect from the District Magistrate. Here everything turns on what the order was, and this is precisely what we are not told. If it interfered in any way with the Deputy Magistrate's judicial discretion, as, for instance, if it directed him to convict when he did not think the accused guilty, then it was indefensible, and Mr. Manomohan Ghose would have scored a real point if he could have asserted this. But if the order related only to a matter of procedure, as, for instance, if it directed a postponement of the case till fresh evidence, known to be on its way, could be produced, or even if it related to the penalty to be inflicted in the event of conviction, pointing out that certain classes of offences had become frequent and needed to be put down by severe punishment or the reverse, then it cannot be asserted that anyone suffered injustice. Mr. Manomohan Ghose has chosen to keep us in the dark as to the only point which can show whether the case is or is not relevant to the issue.

The second case is given as a "glaring instance of the system" which came under the writer's observation :—

"A man complained to a Deputy Magistrate that he had been severely thrashed by the District Magistrate. The marks of the thrashing upon his person he showed to the Deputy Magistrate, and asked for redress. The Deputy Magistrate was much disturbed on finding that the complaint was against his own superior officer, and, without putting a single question, he wrote on the complaint : 'The case is manifestly false. I dismiss it, and I call upon the complainant to show cause why he should not be prosecuted for bringing a false charge.' In the meantime the man appealed to the Judge of the district against the order dismissing his complaint. The rumour reached the accused District Magistrate, who happened to be in the interior, and, as any Englishman of honour would do, he im-

mediately wrote a letter to the District Judge, saying that he did strike the man, under great provocation, thus admitting the whole case. . . . . The only practical inference to be drawn is that subordinates are in great fear of their superiors, upon whom their future prospects depend."

I was Lieutenant-Governor at the time, and had personal knowledge of the case; and the practical inference which I should draw is that the people at any rate do not think that the Subordinates are in great fear of their Superiors, or this man would not have filed a petition in a Subordinate's Court incriminating his Superior. The fact is that the case, instead of illustrating a rule, was a highly exceptional one. The circumstances which made it exceptional were well-known to Mr. Manomohan Ghose, who was Counsel to the assaulted person, but he does not mention them here. They were that the Deputy Magistrate had broken down a short time before from overwork and exposure, and was certified by the Civil Surgeon to be suffering from cerebral derangement. He was allowed to take leave for nearly three months, and on his return was posted to this district, and had only just arrived there, this being the first, or almost the first, case brought before him. The Chief Secretary to Government, after severely condemning his procedure, wrote officially as follows:—

"The whole action taken by the Deputy Magistrate on this occasion is, in the Lieutenant-Governor's opinion, inexplicable except on the hypothesis that his mind has not yet regained its equilibrium, and that he is still unfit to discharge properly the duties of a Deputy Magistrate. His Honour desires, therefore, that he may at once be relieved of his duties and called on to take further leave for such period as may afford him a fuller opportunity of recovering his health."

It was to this cause, and not to the discreditable motive imputed to him by the writer of the Article, that his misconduct should be attributed; and it was hardly ingenious on Mr. Manomohan Ghose's part to conceal a matter so essential to the right understanding of the case.

He returns, however, to the same instance in his Memorandum (case No. 20) and there he does allude casually to the plea that the Deputy Magistrate had been suffering from a disease of the brain, though without admitting that that fact relieves him from responsibility for his acts, for he ends by saying: "His misconduct went wholly unpunished, and the obvious result of the action of the Bengal Government was to make other Deputy Magistrates feel that if placed in similar circumstances they must not assert their independence." How the refusal to punish a man for an act committed when suffering from a disordered brain can have created such an impression, Mr. Manomohan Ghose alone can explain. The conduct of the official was stigmatised in strong language, and he was ordered to take leave and not to rejoin till he was recovered and fit for work; but when a short time afterwards a vacancy occurred which he stood first on the seniority list to fill, and which would ordinarily go to the next senior, except in a case of marked demerit, I did not think it right to pass him over and punish him for an act for which I did not hold him responsible. He had held a high and unblemished character, with this one exception, and he consequently was not subjected to the indignity of supersession by a junior.

But even if the circumstances which I have stated as palliating and explaining the misconduct had not existed, the case as stated by Mr. Manomohan Ghose is not an instance of injustice committed through the interference of the District Magistrate with the judicial independence of his subordinates. The logical process in that gentleman's mind appears to be as follows:—(1) The Deputy Magistrate committed a serious act of injustice: (2) he must have done this through fear of offending his superior, the District Magistrate: (3) therefore he ought no longer to be subordinate to the District Magistrate, but, instead, to be placed under the Judge. Suppose this were done and that a complainant had been assaulted by the Judge, then the Deputy Magistrate would, ex-hypothesi, have been equally afraid of offending the Judge, and how would justice be the gainer?

The third case is mentioned both in the Article and in the Memorandum (where it is No. 9) but there is a material difference in the telling of the two stories. According to the Article, a District Magistrate asked a rich zemindar for a subscription to a public object and, offended at his refusal, determined to punish him by reviving an old charge against him which had been dropped: but he offered by letter to quash the prosecution if the zemindar would pay the subscription. This looks an ugly story, though it will be noticed that the Magistrate's oppressive conduct had nothing to do with his judicial powers, but with his executive authority as Head of the Police, and even if all judicial powers and control of Subordinate Magistrates were taken away, a tyrannous District Magistrate could still exercise the same kind of oppression. But in the Memorandum, Mr. Manomohan Ghose's tale differs materially. Here it appears that the zemindar had a land dispute with certain Muhammadans between whom and his men several cases had been instituted. It was these cases (or one of them) that were revived, and "about this time certain overtures were made by the District Magistrate to the effect that if the zemindar would sell the property the prosecution would be withdrawn." The offer was not, as stated in the Article, contingent on the payment of the subscription, but on the sale of the property to the other claimants, by which arrangement the dispute would be settled and the peace of the country restored. The withdrawal of a prosecution contingent on the payment of a subscription would have been a scandal; its withdrawal contingent on the removal of the subject of quarrel was highly reasonable, and shows that the prosecution was not instituted for a malicious purpose but to secure the peace; if that object were attained, it would be dropped. The Magistrate here appears to be totally free from blame: I can hardly say as much of the inaccurate and disingenuous charge brought by Mr. Manomohan Ghose in his Article.

I turn now to the instances given in the Memorandum; but as I am doubtful whether that paper has been in the strict sense

published, it seems better to deal more briefly with them, and only to say enough to indicate how far they do or do not bear out the object with which they have been compiled. They are twenty in number, and I have already dealt with two of them. These instances range between 1874 and 1894: ten belong to the seventies, six to the eighties, and four occurred during the five years that I was Lieutenant-Governor of Bengal. They do not, therefore, indicate a great abundance of subjects for complaint, and though Mr. Manomohan Ghose says he has not included nearly all the cases he could bring forward, and has omitted all petty cases of nearly daily occurrence, it seems fair to suppose that he has brought forward all the more important ones that could be adduced in support of his contention.

No. 1.—A District Magistrate ordered a certain man to be arrested and prosecuted, and began to try the case himself. The Judge held that no reasonable ground for a prosecution existed. The District Magistrate was degraded by the Lieutenant-Governor and debarred from ever again having executive charge of a District. This occurred in 1876. It was a very bad case, but the officer was evidently an exceptionally bad Magistrate, for so severe a punishment is almost without precedent.

No. 2.—A District Magistrate ordered certain persons to be prosecuted, and after the trial had begun before one Subordinate Magistrate he transferred it to the file of another. The suggestion is made that he did this because he believed that the first Subordinate would acquit, but no grounds for this suspicion are given. The men were convicted but the conviction was annulled by the High Court, who held that the Magistrate had no legal power to transfer the case. This instance fails to prove anything except a technical irregularity on the part of the Magistrate.

No. 3.—A District Magistrate wrote to a Subordinate that the accused in a certain case ought to be punished with the maximum penalty the law allows. I have already said that

when some classes of cases become exceedingly rife, such an instruction may be expedient.

No. 4.—In a dispute concerning the boundaries of a fishery, a District Magistrate conceiving that there was danger of a breach of the peace took the steps provided by law to prevent it. The High Court annulied the order on the ground that the Magistrate had not acted on any sworn evidence but on his own information. This instance is altogether irrelevant to the issue before us ; no injustice is shown to have ensued.

No. 5.—The gravamen in this case appears to be that the District Magistrate, having ordered the trial of a case before a Deputy Magistrate, interfered with his pocedure by instructing him not to summon a certain Rájá into Court, but to go to his house to take his evidence, and again directed him as to the order in which the witnesses should be examined. The Deputy Magistrate also went to consult the Magistrate at his house, before dismissing the case. It does not appear that there was any impropriety in the instructions given by the Magistrate, which may have been very necessary, if the Deputy was young and inexperienced ; and it is not alleged that any justice was done to anyone. This story, therefore, does not seem relevant to the issue.

Nos. 6 and 7.—In these two instances the District Magistrate made over certain cases for trial to Subordinate Magistrates with second-class powers, from whose decisions in ordinary course appeals would lie to himself. The High Court held that, as he had taken an active part in the prosecution, it was not fitting that he should hear the cases in appeal. It does not appear that he wished to hear them ; on the contrary the High Court wrote that he himself naturally felt that it would not be seemly. I do not understand the object with which these two instances have been included in the Memorandum.

No. 8.—At a time when indigo disputes were very common, a District Magistrate considered that one of his Subordinates was passing unduly lenient sentences on accused persons, and

"laid down certain instructions for his future guidance." The nature of these instructions is not stated ; but after receiving them the Subordinate inflicted severe penalties, and quoted the Magistrate's instructions in defence of his severity. For the reasons given already it seems probable that the District Magistrate did nothing beyond what was expedient and for the public good.

No. 10.—A District Magistrate, having learned from his subordinates that some persons were committing acts which endangered the safety of a public embankment, went to the spot and ordered the arrest of two persons who were, he considered, committing such an act, and, holding a summary trial himself, convicted and sentenced them. The High Court upset the conviction and held that as he had not acted on information laid before him generally, but was himself the prosecutor, he ought not to have used his powers of summary procedure in the trial. Here the Magistrate was indiscreet and hasty, but he acted for the protection of the public, and his conduct involved no interference with the judicial independence of anyone. The story does not seem to me to support the indictment.

No. 11.—In a case of supposed murder the Subordinate Magistrate discharged the accused, and by the District Magistrate's order two witnesses were prosecuted for perjury and convicted, but the conviction was upset in appeal. This story discloses nothing to the discredit of the District Magistrate and I do not see why it has been included.

No. 12.—In a land-dispute in which an indigo factory was involved, a Subordinate Magistrate convicted one person of being a member of an unlawful assembly, and ordered the indigo planter to be replaced in possession of the land. The District Magistrate went to the spot in person to enforce this order, with a body of the Police, and arrested some men of the other party for resisting the order ; he also ordered the arrest of the claimant himself who lived at some distance, and when brought before himself he refused to admit him to bail, though the offence charged was a bailable one, on the ground that if

at large he would get up a riot. The claimant was acquitted by the Sessions Court, and the High Court condemned the "irregularity and serious indiscretion" of the District Magistrate. The justice of these remarks must be conceded, but in his defence it may be urged that he was endeavouring to prevent (as he believed) a serious breach of the peace, and in such circumstances a little technical irregularity may be overlooked.

No. 13.—The Krishnagarh Students' case is told at great length, in which the District Magistrate ordered the prosecution of some college boys for making a disturbance at a festival. The Lieutenant-Governor condemned his conduct in no measured terms, but the fault he found with him was not high-handedness or interference with the judicial independence of subordinates, but want of judgment and discretion, and failure to exercise any real control over the case. The story is therefore hardly relevant to the question at issue.

No. 14 is a very similar case. Here, too, the District Magistrate was severely censured by the Lieutenant-Governor for his passive acquiescence in the abuse of official power by others, for foolishly sanctioning the issue of a summons which ought never to have been issued, and for failure in his duty as the chief controlling and executive authority in the district. These defects in a Magistrate are very serious, but they have nothing to do with the assertion that judicial power is misused by District Magistrates, in order to carry out the views they hold as executive officers.

No. 15.—The Magistrates disapproved of the management of a religious festival, and directed the Police to prevent people from attending it. This interference brought on a disturbance and produced a harassing series of criminal cases, all of which ended in acquittals either before the Court of first instance, or the Judge in appeal. The Lieutenant-Governor strongly censured the indiscreet and improper proceedings of the local officials, including the District Magistrate, which "involved a grave misuse of judicial authority." I do not understand that this phrase was meant to apply to the District

Magistrate himself. The Lieutenant-Governor sums up the misfeasance of the District Magistrate thus: "Instead of at once putting a stop to the prosecution, and staying the arbitrary proceedings of his subordinate, he allowed the case to proceed, passed the weak and injudicious order to the Deputy Magistrate about proceeding under Section 144 of the Criminal Procedure Code, arbitrarily dismissed the Government Pleader and suspended the Sub-Inspector of Schools almost avowedly for the part they had taken in support of the rival *Méla*, sanctioned what he ought clearly to have seen was an unjustifiable prosecution by the Deputy Magistrate under Section 193 of the Indian Penal Code, and so through his mismanagement and remissness caused what before was a trivial and unjustifiable exhibition of feeling to grow into a grave public scandal." This censure is grave and weighty, but it does not impute any misuse of judicial power nor does it charge the Magistrate with any misconduct which he could not commit if the views of those who support the separation of his judicial from his executive functions were carried into effect.

No. 16.—In a dispute about the right to a tank, the District Magistrate sanctioned a prosecution which in the end came to nothing, the High Court remarking, "we do not think this prosecution was rightly instituted." A suggestion is made that the subdivisional officer would not have carried on the prosecution had he not thought he was fulfilling the Magistrate's wishes, but for this no foundation is adduced.

No. 17.—A land dispute had been pending for some time between two rival zemindars, neither of whom would give way. The subdivisional officer seeing that the disputes would lead them into great outlay and might end in a breach of the peace, called in the two rivals and locked them up in his room till they settled their quarrel amicably; and when after a few hours they came to terms, he reduced their agreement to writing, and jocosely told them that if either went back from his agreement he would have to pay a sum of money to the Dufferin Fund. Unfortunately, one of them did repudiate the agreement, and

the High Court held that it could not be maintained as it was signed under compulsion, and censured the subdivisional officer. I held that he certainly had acted in an extra-legal rather than a legal manner, dealing more as a schoolmaster with two boys or a father with two sons than as a Magistrate— putting a half-humourous compulsion upon them for their own good, and that his motives were wholly laudable. Mr. Manomohan Ghose's story is inaccurate in representing that the officer took the side of one disputant and put compulsion only on the other ; but his main error lies in quoting this case at all as an instance of irregular conduct by a District Magistrate. The officer concerned was a Subdivisional or Subordinate Magistrate, and the District Magistrate had no concern with the affair.

No. 18.—A drunken zeminder came into collision with the cart of a District Magistrate who was on tour, assaulted the cartman and afterwards went into a woman's house and made a disturbance there. The Magistrate took up the case with much acrimony, and personally supervised and pushed on the prosecution of the zemindar, who in the end admitted the assault and was sentenced to a moderate fine. The offence was really little more than a drunken freak, and the Magistrate showed great animosity and want of temper and dignity but nothing illegal was done by him and no misuse of judicial power is alleged.

No. 19 was a rather similar case. A Rájá stopped up a drain in order to build a wall for a palace he was constructing, and though he promised to divert the drain and prevent the water from flooding a part of the town, he took no steps to perform his promise. The District Magistrate, taking a very exaggerated view of the damage done, ordered the Rájá to be prosecuted, and in the Court of a Subordinate Magistrate the Rájá was treated with unnecessary discourtesy, and being convicted of "mischief" was sentenced to pay a fine. In appeal the Judge acquitted him of "mischief", but held that he had committed a public nuisance. The affair was especially unfortunate,

as the Rájá had been a great public benefactor of the town. In dealing with it as Lieutenant-Governor I severely blamed the indiscretion of the Magistrate, but said that I had convinced myself that, however mistaken, he had acted in good faith and for the protection of the public. The case is hardly relevant to the question at issue, for no judicial powers had been used by the District Magistrate, though he certainly pushed the theory of his right to control the procedure of his Subordinate Magistrate to an excessive length.

I have now gone through the twenty-one instances brought forward to prove the evil of the union of judicial and executive functions in the hands of the District Magistrate, and I summarise them as follows :—

One case in which the District Magistrate ordered a prosecution and tried the case himself. (No. 1.)

One case in which he committed a technical irregularity which caused no injustice. (No. 2.)

Two cases in which he gave instructions to subordinates as to the extent of penalty to be inflicted in certain classes of offences. (Nos. 3, 8.)

Two cases in which he gave instructions to subordinates as to procedure. (No. 5 and the case reported in the Article.)

Two cases in which he committed the irregularity of proceeding on his own information, not on sworn evidence. The latter also showed indiscretion as to prosecution. (Nos. 4, 10.)

One case in which he showed indiscretion in ordering a prosecution which should not have been ordered. (No. 16.)

Four cases in which he showed indiscretion both in ordering and conducting a prosecution. (Nos. 12, 15, 18, 19.)

Two cases in which he showed indiscretion in ordering a prosecution, and great want of control over his subordinates. (Nos. 13, 14.)

Four cases in which nothing improper is shown to have existed in his conduct. (Nos. 6, 7, 9, 11.)

Two cases which relate only to the conduct of subordinates, not to the action of the District Magistrate. (Nos. 17 and 20.)

Surely this is a very small outcome of the voiding of Mr. Manomohan Ghose's budget of "horrid examples" collected by him during his practice in twenty-one years. One case, and only one, the first on the list, would have been prevented if the District Magistrates were deprived of judicial powers. Five cases, the next following on the list, would have been prevented if he had no power of transferring trials from one Court to another, or of giving instructions to Subordinate Magistrates, but there is nothing to show that the instructions were not excellent and that their prevention would not have been pure loss to the administration of justice. The other nine cases (rejecting the six which are wholly irrelevant) involve the personal eqation of the Magistrates concerned. As long as men are men, we shall have in a large body of Government servants, however excellent, some who are hot-headed, or wanting in temper and discretion, or unwise and slothful, or over-eager to attain a good end by irregular or over-bearing means. But we cannot fail to remark how few the instances are which assiduous research has been able to produce out of a long series of years, and how severely such cases as deserved it have been dealt with by the High Court or the Lieutenant-Governor. Above all, we cannot fail to remark that in all these cases, except one, the acceptance of the reform urged upon us would have failed to remedy the injustice which was done or seems to have been done : the misconduct occurred not in the performance of the Magistrate's judicial functions, but of his powers as Executive Head of the Police, of ordering prosecution and arrest, and these powers it is not proposed to take from him.

To sum up, I venture to submit that the attack has wholly failed, and that nothing has been brought forward to weaken the force of the arguments I have adduced for the retention of the District Magistrate in his position as the pivot of the Administration and the controlling Head of the Subordinate Magistrates in the district.

## XIII.

*Article (printed in "INDIA" for November, 1896) by Mr. Herbert J. Reynolds, C. S. I.*

The current number of the *Asiatic Quarterly Review* opens with an article which has, perhaps, surprised some of those who call to mind the earlier reputation of Sir Charles Elliott. When he won his spurs, first as Secretary of the North-West Provinces, and afterwards as the guiding spirit of the Famine Commission of 1878, he was known as an advanced and ardent Liberal, too advanced, indeed, to thrive in the Conservative atmosphere of Indian official life. But this is an age of strange conversions and unexpected changes. The generation which has seen Mr. Chamberlain a prominent member of a Tory Cabinet need not greatly wonder to find Sir Charles Elliott the opponent of a much-needed reform, the champion of an indefensible abuse.

The particular reform against which Sir Charles Elliott contends is the proposal to separate judicial and executive functions in Bengal, so that these powers shall no longer be united in the same individual. Whatever may be thought of his judgment, the selection of this topic is at least creditable to his courage. For the expediency of this reform is one of the few Indian questions upon which men of all parties and interests are agreed. Conservatives and Liberals here find themselves in the same lobby. Mr. Bhownaggree is the only Indian gentleman now in Parliament, and he sits on the Ministerial side of the House. But on this subject he is in full accord with the Opposition; and in a recent debate he emphasised his convictions by delivering an earnest and impressive speech in favour of this reform. The question is not one in which abstract arguments can be quoted on one side, and the weight of practical experience and authority on the other. Lord Cross and Lord Kimberley have both held the office of Secretary of State for India. They differ widely upon many points; but in their support of this proposal they are in complete harmony. It has sometimes (I do not say justly) been made a

matter of reproach against lawyers that they are slow to originate or to welcome reforms in legal procedure. But Sir Richard Garth, a late Chief Justice of Bengal, and Sir W. Markby, a late Judge of the Calcutta High Court, warmly advocate the scheme. Sir Raymond West, formerly a Judge of the High Court of Bombay, has added his testimony to theirs.

What, then, can have induced his new "Athanasius contra mundum" to resist a proposal recommended alike by authority and by reason? Is it possible that the secret is disclosed in the opening paragraph of the Article? This reform, we are told, "is a leading plank in the platform of the National Congress party." And a little further on, the writer refers to "Mr. Manomohan Ghose and the Congress party" in tones of unmistakable aversion and contempt. It is no doubt true that the people of India, speaking through their representatives in the Congress, have pressed this reform, among others, upon the Government, and Sir Charles Elliott has made no secret of his dislike of the Congress and its doings. But a man must think very badly indeed of the Congress if its advocacy of a cause, however just and reasonable that cause may be, is alone sufficient to induce him to range himself on the opposite side. I cannot retort, even if I had wished to do so, by speaking of "Sir Charles Elliott and his party," for on this question I do not know that anyone agrees with him. But it should be remembered that the part of Athanasius is sublime when he is the solitary champion of a valuable truth; it becomes ridiculous when he is the last supporter of an exploded error.

Mr. Manomohan Ghose, a well-known barrister of Calcutta, lately issued two pamphlets, one containing the opinions of eminent authorities on the union of executive and judicial functions, and the other a compilation of actual cases illustrating the evils and abuses of the present system. Sir Charles Elliott, in traversing this indictment, declares that—

"The existing system has great merits and advantages, that it in no way trenches on the judicial independence of the

subordinate magistrates, that there are weighty arguments against its modification besides those which arise from financial considerations, and that no valid proof has been adduced of any evil arising from it."

In support of this view, he lays down two propositions : first, that it is essential that the District Magistrate should hold in his hands all the threads of the different branches of the Administration, and should have the officials in all those branches under his general control ; and, secondly, that the subordinate Magistrates ought to be advised, guided, and inspected by a superior officer and that this end could not be attained if the control of the Judge were substituted for that of the District Magistrate. Sir Charles then proceeds to analyse the selected cases referred to by Mr. Ghose, and he comes to the conclusion that six of the cases are wholly irrelevant to the present issue ; that in the five cases there is nothing to show that the prevention of the magistrate's action would not have been pure loss to the administration of justice ; that nine cases do not show the system to be a bad one, but simply "involve the personal equation of the magistrates concerned" ; and that in all the cases, except one alone, "the acceptance of the reform urged upon us would have failed to remedy the injustice which was done or seems to have been done." "The attack, therefore, has wholly failed."

It appears to me that such statements as these, coming from a writer who has held the responsible office of Lieutenant-Governor of Bengal, ought not to be passed over in silence, but that they should be examined and (if it may be) refuted. I am not so sanguine as to hope to convert Sir Charles Elliott to my view of the question. There are those of whom it was written of old that they would not be persuaded, though one rose from the dead ; and their descendants are still among us. But I trust to be able to show, to the satisfaction of candid and impartial readers, that it is the defence, and not the attack, which has failed ; that the present system is responsible for serious evils which could easily be removed ; and that,

in the interests of the pure administration of justice, of popular confidence in our tribunals, and of the credit of British rule in India, it is imperative that these scandals should be swept away, and that a strict line of demarcation should be drawn between the judicial and the executive departments.

Into the abstract merits of the question it is unnecessary that I should enter. That it is undesirable that the same person should at once be police-officer, prosecutor and judge is a proposition to which all will assent. What is contended is that this system, though there may be objections to it in theory, works well in practice ; that the evils which might bo expected to arise from it do not actually occur ; and that it possesses countervailing advantages of great weight and importance. How far this defence has been established we are now to consider. But it should be borne in mind that the burden of proof is thus shifted, and rests upon those who uphold the present arrangement. That a system which is vicious in principle will naturally bear evil fruit is a reasonable conclusion. It is for Sir Charles Elliott to show that this is one of those exceptional cases in which it is possible to gather grapes from thorns and figs from thistles.

The first proposition is that it is necessary that the district magistrate "should hold in his hands all the threads of the different branches of the administration," or, as it is put in another paragraph of the Article, that "all power should be collected into the hands of a single official." One feels inclined to exclaim, with Macduff,

> "What ? all my pretty ones ?
> Did you say all ?"

Really, one would think that Sir Charles Elliott had never heard of District and Sessions Judges, Subordinate Judges, and Munsiffs. The disposal of civil suits, and the trial of all serious criminal cases, are surely rather substantial "threads." There are many classes of offences which the Magistrate has at present no jurisdiction to try. Why should it be thought a monstrous proposal to prohibit him from trying any ? He is incompetent to

try a murderer ; but we are asked to believe that the heavens would fall if he were forbidden to try a thief. Even in executive departments it is not accurate to say that the Magistrate is the centre of all authority. Sir George Campbell tried to make him so : but his system broke down under its own weight. He laid upon the shoulders of District Officers a burden too heavy for them to bear : and though, in the twenty-five years which have since elapsed, his policy may not formally have been reversed, it has been silently set aside, and there has been a steady movement in the opposite direction. The Post Office Department is not controlled by the District Magistrate : Education (other than primary) is not in his charge : he is no longer the *ex-officio* Chairman of all Municipal Committees. Registration and Public Works, and even Excise, are tending more and more to specialise themselves under their own departmental heads. And progress in this direction is inevitable, and will advance in the near future with accelerated speed. The system which Sir Charles Elliott applauds may do very well for a barbarous or half-civilised community : it is unsuited to the needs and circumstances of such a province as Bengal. It is, therefore, fortunate that this autocratic chief, who is fast becoming an impossibility, is not so necessary as Sir Charles Elliott fancies him to be. The success of our administration does not depend on the concentration of all power in the hands of one man, but upon all our officers making the best use of the powers they have. There are some powers which have been seriously abused, and which will always be abused, while human nature remains what it is : and it is for the public good that such powers should be taken away.

It is objected, however, that the District Magistrate really tries very few criminal cases, and that, therefore, the proposed reform would make no great difference. Such an argument shows an entire misconception of the nature of the evil, and of the operation of the suggested remedy. The mischief is done, not by the cases which the District Magistrate personally tries, but by his power to try such cases as he

thinks fit; by his power to transfer a case from a subordinate who shows signs of independence, to one who will be a ready tool in his hands; by his power to interfere, at every stage of a trial, with advice which is equivalent to a command; by his power at once to conduct the prosecution, and to dictate the sentence. The cases which Mr. Ghose has quoted clearly show that these are no imaginary evils, but real and serious maladies, which will assuredly recur so long as the present system is maintained. The remedy lies, not merely in relieving the District Magistrate of judicial duties, but in subjecting all judicial officers to the control and supervision of the judicial authorities alone. And this brings me to the second part of the argument.

It would be a fatal mistake, says Sir Charles Elliott, to put the Subordinate Magistrates under the Judge. It is most useful to them to receive guidance and counsel at the District Magistrate's hands; above all, it is of paramount importance that their work should be regularly inspected, a duty which is the breath of the Magistrate's nostrils, but which would be impossible to the Judge. I am at a loss to know how to deal with such baseless assumptions as these. Sir Charles seems to look upon the Judges as a kind of gods of Epicurus, residing in some distant cloud-land, regardless of human affairs, and only awakened from their repose by the presentation of an appeal. Perhaps this is because he has never filled the office himself. Why should not the Judge be as competent as the Magistrate to guide and advise? Why should it be taken for granted that he will withhold all supervision till a case comes before him in appeal? Why should inspection duty be impossible to him? In Maimansingh, where I was for some years Magistrate and Collector, there are four or five outlying munsiffees: and these as well as the offices at headquarters were regularly inspected by the Judge. The value of the advice and counsel which Subordinates sometimes receive under the present system may be tested by a reference to No. 8. of Mr. Ghose's list of cases. The Subordinate in that case acting upon the Magistrate's

instructions, passed an illegal order, which was set aside on appeal. Sir Charles Elliott has the courage to dismiss this case with the brief comment that "it seems probable that the District Magistrate did nothing beyond what was expedient and for the public good." It is apparently for the public good that a superior officer should instruct his subordinate to violate the law. Another flagrant example is supplied by case No. 3. A Magistrate directed his Subordinate to sentence an accused person, then under trial before him, to the maximum punishment allowed by the law. This was a tolerably clear intimation that the Subordinate was to begin by finding the accused guilty. But Sir C. Elliott sees nothing improper in this. "Such an instruction," he quietly remarks, "may be expedient." The High Court, however, did not think so, as it promptly ordered the case to be transferred to the file of another officer, a conclusion to the story which Sir Charles has not thought worthy of notice. It may confidently be asserted that such counsel and guidance as were given by the Magistrate in these two cases would never be given by a Judge to his judicial subordinates ; for a Judge may be trusted not to sacrifice justice to his own ideas of expediency.

So much for the "two definite propositions" of Sir Charles Elliott's Article. Space limits will not allow me to examine in detail the cases quoted in Mr. Ghose's second pamphlet. I am not altogether sorry for this, for the pamphlet is a painful record of injustice, oppression, weakness, and folly. What, then are we to think of a system under which these cases could occur, and what condemnation can be too severe for those who resist a reform which would make their recurrence impossible ? Sir Charles Elliott, as might be expected, makes the most of the numerical argument. After all, he says in effect, there are only 20 or 21 cases in 20 years. Of course, such bad cases as these are exceptional ; if they were not, we should not be the rulers of India to-day. But the evil system of whose working these cases are flagrant and outrageous instances has been in operation all along, and is in opera-

tion now to poison the springs of justice in the court of every magistrate in Bengal. These "horrid examples," of which Sir Charles Elliott speaks so lightly, are only types and specimens of hundreds more, in which similar injustice has been done, but there has been no publicity and no redress. And it is important to observe that recent instances show no signs of improvement. The case (No. 19) of the Rájá of Maimansingh, which occurred in 1892, is as bad as any of those which disgrace the earlier years of the series. It is clear that the disease is not dying out : it is necessary to stamp it out : and the time has come to apply the only remedy which will work an effectual cure.

But, though I have not room to give a complete analysis of the cases, I must devote some lines to the excuses and apologies by which Sir Charles Elliott sometimes palliates, and sometimes boldly defends, the misdeeds of his clients, the District Magistrates. I will not pause to comment upon the cold cynicism of these remarks in the Article, and the entire absence of any feeling of sympathy with innocent victims, who have suffered grievous wrong. My opponent may say and with perfect truth, that it was no part of his duty to indulge in sentiment. But the man is not to be envied who can peruse such a record as this without a blush of shame, or a throb of indignation.

Case No. 4 is summed up in the Article with the remark that "this instance is altogether irrelevant to the issue before us : no injustice is shown to have ensued." The Magistrate, in this case, by an executive order, practically overruled a judicial decision, and then, when his illegal proceedings had been quashed by the High Court, issued instructions to his police which had the effect of setting aside the High Court's order, and depriving a number of fishermen of their property, which was handed over to the Magistrate's lessee, this lessee being an officer of the Magistrate's court.

Similarly, in case No. 5, we are told that "it is not alleged that any injustice was done to any one." A respectable man,

the dewan of a Rájá, was arrested under a warrant on an unfounded and utterly frivolous charge, and the hearing was prolonged, under the instructions of the Magistrate, till the accused had been compelled to expend more than Rs. 10,000 in costs and fees. But in this case, as in the last, no injustice was done to any one !

Cases 6 and 7 are bracketed together in the Article as if they were identical, and Sir Charles Elliott "does not understand the object with which these two instances have been included in the Memorandum." In No. 7 the only hardship was that it was necessary to incur the trouble, expense, and delay of moving the High Court, before the Magistrate could be prevented from hearing the appeal in a case in which he had been the virtual prosecutor in the court below. This was a defect in the law ; and the Magistrate, to do him justice, was quite willing that another officer should hear the appeal. But in No. 6 the Magistrate actually opposed the transfer of the appeal, on the ground that the transfer would injure his prestige as the District Officer. It is strange that Sir Charles Elliott should have overlooked this material difference between the two cases, and that he should not understand their inclusion in the memorandum. It is surely clear that if the appeals had lain to the Judge, and not to the Magistrate, which is the reform for which we contend, the cases could not have occurred.

On case No. 9 the comment is that "the Magistrate here appears to be totally free from blame." The Government, as represented by the Legal Remembrancer, thought differently ; for, to escape the scandal of having the matter threshed out in the High Court, it allowed the vindictive orders of the Magistrate to be set aside without attempting to defend them.

No. 12 was a disgraceful instance of illegality and oppression ; but Sir Charles Elliott urges that the District Magistrate was endeavouring to prevent (as he believed) a serious breach of the peace, and in such circumstances a little technical irregularity may be overlooked. No doubt there was danger of a

riot; but the decision of the Sessions Judge makes it perfectly clear that the only rioters were the Magistrate and his party. The accused persons, who had committed no offence whatever, were eventually acquitted; but this was after they had been kept in custody for more than two months, bail having been illegally refused them, and after their crops on the disputed land had been destroyed. "It is quite clear," said the Judge, "that, from first to last, what the Magistrate was trying to do was to restore possession to the factory. This he had no right to do." These unfortunate men were illegally arrested, illegally kept in jail, and half-ruined by the destruction of their property; and this is what Sir Charles Elliott calls a little technical irregularity.

Case No. 15 was disposed of by the Lieutenant-Governor (Sir Steuart Bayley) in a Resolution which declared that there had been a grave misuse of judicial authority. Sir C. Elliott observes upon this, "I do not understand that this phrase was meant to apply to the District Magistrate himself." This is a surprising remark in face of the fact that the Resolution goes on to say, in words which Sir C. Elliott would do well to lay to heart: "The whole case is a striking illustration of the danger and inconvenience of the union of executive and judicial functions in the same officer, when that officer happens to be indiscreet and intolerant." The indiscreet and intolerant officer was no other than the District Magistrate himself; and the case originated partly in his arbitrary temper, and partly in his religious prejudices. To the persons who were harassed, threatened, arrested, fined, and imprisoned in the course of these proceedings, which extended over six months, it would be a poor consolation to be told that the matter was really of no importance, as it merely "involved the personal equation of the Magistrate." Sir Charles Elliott is mistaken in adding that the Magistrate could have acted just as he did, if the separation of his judicial from his executive functions had been carried out. He could not, in that case, have instructed the Deputy Magistrate to take action under Sec. 144 of the

Criminal Procedure Code, nor could he have sanctioned a prosecution under Sec. 193 of the Penal Code.

He is mistaken again in his comment on No. 17, where he charges Mr. Ghose with error in quoting this case as an instance of irregular conduct by a District Magistrate. The only error is his own. Mr. Ghose nowhere says that the officer was the District Magistrate. The abuse which Mr. Ghose is combating lies in the union of the two functions in the same officer; and whether that officer is the District Magistrate, or a Magistrate in charge of a sub-division, makes no difference to the argument.

But these mistakes are trivial, compared with the astonishing statement made in the penultimate sentence of the Article, that "in all these cases, except one, the acceptance of the reform urged upon us would have failed to remedy the injustice which was done." The excepted case is No. 1 in Mr. Ghose's list. Even if the proposed reform were confined to depriving the District Magistrate of judicial powers, there are at least four other cases (Nos. 6, 7, 10, and Jitoo Lal's case in No. 12) in which it would have been effectual. But the claim of the reformers, as I have already pointed out, is not limited to this. It extends to a complete severance, in officers of all classes and grades, between judicial and executive powers and functions. Sir Charles Elliott cannot plead ignorance of this; for, as he has criticised and condemned Mr. Romesh Chunder Dutt's scheme, he must be presumed to have read it; and in that scheme the nature and extent of the proposed reform are clearly and fully explained. This being so, I assert with confidence that not one of the cases in Mr. Ghose's list is irrelevant to the issue; that each and all of them would have been rendered impossible if the reform for which we contend had been carried out; and that, from the day on which that reform shall be enforced, such cases will cease to occur. This is not the place to discuss Mr. Dutt's proposals: I will only say, speaking as one who has had many years' experience as a Bengal Magistrate and Collector, that I believe that they are perfectly feasible,

that they could be realised at a trifling cost, and that they would have a most salutary effect.

Sir Charles Elliott has thought it seemly to stigmatise one of Mr. Ghose's narratives as inaccurate and disingenuous. Whether these epithets would not be more fitly applied to his own Article is a point which I am contented to leave to the judgment of his readers.

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## XIV.

*Article (printed in* "INDIA" *for November, 1896) by Sir John Budd Phear.*

A clever and astutely written article by Sir Charles A. Elliott on "The Separation of Judicial from Executive Power in India," which appears in the October number of the *Asiatic Quarterly Review*, deserves and will doubtless command serious attention on the part of all who have at heart the welfare and good government of our Indian fellow-subjects. It proposes at the outset to show (1) that the existing combination of judicial and executive powers in the hands of the District Magistrate has great merits and advantages; (2) that it in no way trenches on the judicial independence of the Subordinate Magistrates; (3) that there are weighty arguments against its modification besides those which arise from financial considerations; and (4) that no valid proof has been adduced of any evil arising from it.

The writer establishes the first of these four heads in a very summary fashion by the simple statement that—

"The keynote to our success in Indian Administration has been the adoption of the Oriental view that all power should be collected in the hands of a single official, so that the people of the district should be able to look up to one man, in whom the various branches of authority are centred, and who is the visible representative of Government."

The insinuation here that the system of administration of government under British rule in India ows its success to

the fact that it has been moulded on Oriental lines, and is therefore specially suited to the genius and liking of the people, is certainly adroit. And to question the correctness of so agreeable an hypothesis might be deemed something worse than unpatriotic. Still, it certainly is possible to find adequate causes, other than this happy approach to the result of natural selection, to account for the centralised and autocratic form of the existing system of the local administration. And as regards the administration of justice in particular, while assuredly it is not to countries governed according to "Oriental views"—Turkey, for instance—that one would go for patterns of excellence, it is shown by the breadth and force of the long growing movement, against which the writer opposes all the weight of his personal authority, that it is precisely in this department that the autocratic government of the District Magistrate fails to secure the confidence of the governed. So much for the argument of success by reason of conformity to Oriental precedent.

To illustrate the thoroughness with which the governing Oriental principle has been applied, the Article proceeds ;—

"The Police Department, the Engineer Department, the Forest Department, the Education Department, the Sanitation Department, have all, as they grew up, tried to shake themselves free of the District Magistrate, but have been replaced in their proper position by such Lieutenant-Governors as Sir G. Campbell in Bengal, and Sir John Strachey in the North-West Provinces—not so as to cripple the power of the experts in each department, but so as to collect all the threads of government in the District Magistrate's hands, enabling him to use the knowledge of all for the purposes of each."

This is a very charming picture of happy family rule under a central benevolent autocrat. And we marvel at the folly of the little wandering sheep who attempted to stray beyond the reach of their ever-watchful shepherd! But in the very next line we meet with a remarkable and significant exception to the universality of the District Magistrate's authority :—

"In judicial matters the more responsible duties of Sessions Trials and the technical work of Civil Justice"—(a delightfully comprehensive phrase, by the way)—"have been placed in the hands of the District Judge"—(who, it should be here remembered, is a District Official co-ordinate with and independent of the District Magistrate)—"but there still remains under the District Magistrate's orders the body of Subordinate Magistrates, who dispose of the simple criminal cases and commit the graver to the Sessions, and the reasons which have been stated above apply with great force to the retention of their subordination."

It is not quite easy to gather from the Article what the reasons here referred to specifically are, except so far as they can be summed up, so to speak, in the one object of collecting all the threads of Government in the District Magistrate's hands; but the value of this particular thread must assuredly be small, seeing that admittedly it does not extend beyond the disposal of the simple criminal cases, while all the rest of the Department of the Administration of Justice within the district is excluded from the province of the District Magistrate, and entrusted to an officer who is entirely independent of him.

The writer of the Article, without pursuing very closely the division of the text with which he set out, proceeds next to deal with the objections, which, he understands, are made by the Congress Party and Mr. Manomohan Ghose:

"to two items in the District Magistrate's position: one is that he, being the executive head of the district, with direct control of the police, has the power of trying cases himself; the other, that Subordinate Magistrates, who try the great majority of cases, receive orders from him and look to him for such reports on their conduct and capacity as may expedite their promotion."

The first of these items he in effect gives up at once, for he admits, with regard to it, that "the District Magistrate does, as a matter of fact, try so few cases that no very serious evil would ensue if he did not possess the power." But he goes

on to mention some grounds on which he thinks "it is well that he should retain this power," adding, "it is occasionally useful that he should take up an important and difficult case to set an example to his subordinates of the proper way of dealing with it." And, finally covering his retreat with a fervid and indignant peroration, of which Mr. Manomohan Ghose will doubtless feel the convincing force, he exclaims :

"There is no real distinction in kind between the action taken before and after the trial. The police-officer is exercising a sort of judicial capacity when he decides whose story he shall believe and which of two clues he shall follow up : the magistrate exercises a similar capacity when he believes or disbelieves the witnesses who appear before him on the Bench. To say that weak evidenee will appear strong to him because he heard it before the trial, or that he cannot appreciate the force of new evidence because he did not hear it before, is unwarranted. To say that he will be so possessed with the passion of the hunter as to be incapable of listening fairly to any evidence in favour of the hunted, is a hypothesis unjustified by general experience or by knowledge of any but the worst sides of human nature."

We thus learn that the police investigation previous to trial, and the trial which follows thereon, are properly not distinct things, but are really one proceeding—the same in kind throughout ; and it naturally follows that it must be an advantage to the officer who is charged with the responsibility of judicially deciding a criminal case to have had the conduct of the police enquiry from its commencement. On this principle it seems plainly to follow that the metropolitan police magistrates are an expensive and unnecessary luxury, and that in the interest of economy and justice they ought to be got rid of, and Scotland Yard to be entrusted with the disposal of their work. Perhaps it is wrong to attach any serious or definite meaning to this rhetorical utterance, but if it in any degree vaguely represents a view common to District Magistrates relative to the methods and rules of the English judicial trial, and the

principles on which they rest, we can only conclude that the sooner these officers are relieved of the responsibility of having to set an example to their subordinates of the proper way of dealing with an important and difficult criminal case, the better for all concerned.

The more important item, however, of the District Magistrate's power is—so the writer tells us—the second of the two items before mentioned by him—namely, his power of control over the Subordinate Magistrates, to be so exercised, it is admitted, as not to interfere with their judicial independence. Many illustrations are given of the sort of control which may be usefully exercised over, and of orders which may be given by District Magistrates to their Subordinate Magistrates, without affecting the judicial independence of the latter. Prominent among them we find the following:

"If the order related only to a matter of procedure; as, for instance, if it directed a postponement of the case till fresh evidence, known to be on its way, could be produced; or even if it related to the penalty to be inflicted in the event of conviction, pointing out that certain classes of offences had become frequent and needed to be put down by severe punishment, or the reverse, then it cannot be asserted that any one suffered injustice."

Whether or not any one in such a case suffered injustice by reason of the District Magistrate's order, must depend upon the facts, whatever they were, and cannot be determined without knowledge of them; but obviously each of the alternatives here indicated is a gross interference with the functions of the Subordinate Magistrate responsible for the proper trial of the case, and directly affects his independence in the exercise of his judicial discretion. When, therefore, we find argument so essentially unsound as this employed to maintain the second item of the District Magistrate's power, we are justified in the conclusion that the case made out for it is even weaker than that made out for the first, in respect of which it is expressly stated in the Article that no serious evil would ensue if the District Magistrate did not possess it.

This is not the place for a dissertation on the merits or demerits, or for an explanation, of the English method of trial and judicial determination of fact through the action of a competent and expert court, which, with certain exceptions, must be informed as to the facts solely through the oral testimony of eye-witnesses, produced and tested before it by fitting examination and cross-examination on behalf of the parties. It is, however, of importance to bear in mind that in a criminal case one of these parties is nominally the Crown, and in reality the police authority. It goes, therefore, to the very root of the security for fairness and equity in the decision of the court, which is so carefully aimed at and provided for by the system, that the police authority should have immediate control over the presiding officer.

Probably the writer of the Article before us, and those who share his views, are not accustomed to pay much consideration to this ingredient in the matter. Still, after all, it is through the English system of trial, and by the application of its principles, and not by any Oriental or patriarchal method, that justice has to be administered in India. Nor is this any new thing. In principle it dates from the time of Impey; it is established and prescribed in considerable detail by legislative enactment on procedure and evidence, and it may be said to have become an accepted institution of the people. And nothing is more certain than that it is of the essence of the English system that the court of trial should, in its whole action, stand absolutely apart from and free of subordination to the prosecuting or police authority, and should be in no degree under its influence.

If the younger and less experienced judicial officers are not fully equal to the duties of their posts, and require instruction or guidance in regard to them, it can surely be nothing more serious than mere matter of arrangement and money to provide these within the Judicial Department itself. At any rate, the District Magistrate does not appear from this Article to be —and, indeed, his character of Chief Constable of the District

prevents him from being—the best, or even a fitting quarter, in which to seek them.

A large portion of the Article is devoted to the examination of a considerable number of cases, which have been put forward. by Mr. Manomohan Ghose, and others, as examples of ill consequences attributable to the District Magistrates' power of control over the Subordinate Magistrates; and they are all made to emerge from the process in such a trivial shape, that one wonders how it ever could have happened that anyone should be deluded into paying them any serious attention; and, strangely enough, too, it is discovered that very few of them are relevant to the purpose for which they have been cited.

The way in which this end has been achieved, and the value of the results arrived at, may be judged of from the two following instances taken from the Article:

"No. 2. A District Magistrate ordered certain persons to be prosecuted, and after the trial had begun before one Subordinate Magistrate, he transferred it to the file of another. The suggestion is made that he did this because he believed that the first Subordinate would acquit, but no grounds for this suspicion are given. The men were convicted, but the conviction was annulled by the High Court, who held that the Magistrate had no legal power to transfer the case. This instance fails to prove anything except a technical irregularity on the part of the Magistrate."

The facts of this "No. 2" are given at some length in Mr. Ghose's Memorandum, to which this abbreviated version refers, and are not here denied or disputed in any particular. It is impossible to read them without a blush of shame at the high-handed proceedings of the District Magistrate, and his straining of the power possessed by him over the Subordinate Magistrates, beyond its proper limits, purely in the interest of a personal friend, who had broken the law, and to the grievous prejudice of the unfortunate villagers. The crying injustice of the case led to the interference of the Lieutenant-Governor of that time, and the whole of Bengal was excited by the scandal. Yet we

have it here that this instance proves nothing except a *technical irregularity* on the part of the magistrate !

"No. 17. A land dispute had been depending for sometime between two rival zamindars, neither of whom would give way. The sub-divisional officer, seeing that the dispute would lead them into great outlay, and might end in a breach of the peace, called in the two rivals and locked them up in his room till they settled their quarrel amicably ; and when after a few hours they came to terms he reduced their agreement to writing and jocosely told them that if either went back from his agreement he would have to pay a some of money to the Dufferin Fund. Unfortunately, one of them did repudiate the agreement, and the High Court held that it could not be maintained as it was signed under compulsion, and censured the sub-divisional officer. I held that he certainly had acted in an extra-legal rather than a legal manner, dealing more as a schoolmaster with two boys, or a father with two sons, than as a magistrate—putting a half-humorous compulsion upon them for their own good, and that his motives were wholly laudable."

There is little need to amplify this version of the case by recourse to the fuller details of it which are given in Mr. Manomohan Ghose's Memorandum. Sir Charles Elliott's account of the matter speaks eloquently for itself. The "rivals," who are locked up by the government official in charge of the sub-division in a room by themselves until they settled their "quarrel" amicably, are two co-sharers of certain landed property, and their "quarrel" is a serious dispute between them as to the extent of their respective legal rights in the property. The "extra-legal rather than legal manner" of action of the sub-divisional officer, and "half-humorous compulsion upon the zamindars for their own good," are delightful phrases. Let us hope that the victims of the pleasantry duly appreciated its humour. Unfortunately (to use Sir Charles Elliott's own words), the High Court, in its judgment, expresse its "unqualified disapproval of the conduct of the sub-divisional officer in the matter," and took the unusual step of ordering a copy of

its judgments to be forwarded to the Local Government. What the Lieutenant-Governor thereupon thought and did in regard to the proceedings of his subordinate, Sir Charles Elliott's explanation now tells us ; and we are, at least, in the position to admire the keenness of that high officer's sense of humour.

These two instances sufficiently illustrate the character of the criticism by which the cases of Mr. Ghose's Memorandum are individually dealt with in the Article and assumed to be demolished, and in each of them we find, as in almost every other page of the Article, ample evidence to demonstrate how greatly the possession of uncontrolled executive power operates to disqualify an officer for the unbiassed and orderly exercise of the judicial function, as well as for the direction of others subordinate to him in the discharge of their judicial duties. Indeed, it is not extravagant to say of the entire Article, its last paragraph notwithstanding, that it leaves the case which it attacks even stronger than it was before, and makes bare the inherent weakness of the arguments by which the continuance of the existing system is defended.

No doubt it is convenient to the central authority of Government, and largely conducive to the smooth and efficient administration of public affairs throughout the country, that it should have a single agent, rather than a plurality of agents, in each district, endowed with large executive power and having the strings of all the local departments of administration in his hand, to serve as the channel of necessary communication and direction. But this reason of governmental convenience and expediency by the nature of the case does not extend to the province of the courts of justice ; and, as a matter of fact, only the lesser local courts of criminal justice are to any extent within the Government agent's control. The Article assures us that it is "not in a vague term like prestige" that the argument for this limited control is based. And we cannot but feel that the proper designation of the cause, to which should be attributed the extraordinary reluctance that is manifested by executive

officers to part with this small measure of control over the courts, is, after all, left unsatisfactorily obscure.

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## XV.

*Article (printed in the* "ASIATIC QUARTERLY REVIEW" *for January, 1897) by Mr. C. D. Field, LL.D; late Judge of the High Court, Calcutta.*

No institution of Western civilisation, introduced into India by British rule, has been more successful than the administration of justice. The success has not been equal in all the provinces of this vast empire, for the period of operation has not been everywhere equal; antecedent conditions have differed; and race characteristics and proclivities have been dissimilar. In no province, however, has this success be greater than in Lower Bengal. The period of operation, ading over four generations, has here been longest. Tl ellectual soil was peculiarly suited to the seed sown; rmination and growth have been promoted, if not f u, by a system of high-class education, one of the strong features of which was the inculcation of English ideas, E sh principles, English institutions, English political exper nces, and English everything.

It is with Lower Bengal only that this paper and the questions therein treated are concerned. India is too v safe generalisation. Reforms that are well and wisel in one province, at one point of time and progress unwise, even injurious, in another province, where th progress and other conditions are different.

Englishmen are in a manner bound to accept results of their own system; they must show impe ness when the weapons of intellectual warfare, t they have taught, are wielded against themselve betray no impatience if their own actions ar of conduct which they have themselves pre

when Mr. Manomohan Ghose, or the National Congress, in-
doctrinated with the English principle of judicial independence,
finds fault with the administration of justice in Lower Bengal
for not being conducted in accordance with this principle, it
behoves us to examine, with all care and patience, whether this
charge be in any way justified, whether we do to our best
endeavour practice what we preach. Time was when Indian
administrators complained that there was no public opinion,
no press to inform them of the feelings of the people : and that
in consequence they had too often to legislate in the dark.
The last quarter of a century has changed this condition
of things. We have now a very active Native press,
a considerable amount of Native opinion and Native criticism,
some good, and much bad or indifferent. Criticism such as
that of Mr. Ma omohan Ghose is good. It meets [illegible] our
own ground w [illegible] own weapons, and [illegible] based not upon
mere words, bu [illegible] substantial experience and facts collected
in the course of [illegible] ssional practice. It is, moreover, open
and candid, nc [illegible] rward under a pseudonym or supported
by unv [illegible] uched assert [illegible] It is not a personal attack, directed
against individuals. [illegible] eed, he is over-careful to say that the
defects are in the *syste* [illegible] and that the fault is *not* to be laid at
the door of *individuals* . [illegible] nd while holding up these defects to
the light, he acknowledges the ability and integrity of the
members of the Civil Service and the benefits flowing from the
[illegible] istration of justice under British rule. With the zeal of
[illegible] cate he makes the strongest possible case for his side of
[illegible] ion ; but upon the published papers it cannot fairly be
[illegible] he has misstated or perverted any evidence upon
[illegible] lies.

[illegible] cial and executive functions ought not to be combin-
[illegible] individual has long been a settled principle of the
[illegible] In 1860 it was decided, after careful discussion
[illegible] that this principle ought to be applied to
[illegible] er, in all its completeness, to all parts and
[illegible] a due regard to the conditions of each,

gradually and to such an extent as those conditions showed to be feasible and prudent, and without danger from too radical change. This policy has never since been altered, nor has its soundness been ever seriously questioned. In accordance therewith it was considered in 1860 unadvisable, and partly for financial reasons not feasible, to carry the separation of judicial and executive functions lower down than the District Officer; but it was then contemplated that the separation should be completely carried out at some future time. The Members of the Police Commission were agreed "that, as a rule, there should be a complete severance of executive police from judicial authorities; that the official who collects and traces out the links of evidence—in other words, virtually prosecutes the offender—should never be the same as the officer, whether of high or inferior grade, who is to sit in judgment on the case, even with a view to committal . . . . that the same true principle, that the judge and detective officer should not be one and the same, applies to officials having by law judicial functions and should, as far as possible, be carefully observed in practice." Having regard, however, to the constitution of official agency then existing in India, they had to make the District Officer an exception to this rule; but they were careful to say—"As the organisation becoms perfected, and the Force effective for the performance of its detective duties, any necessity for the Magistrate to take personal action in any case judicially before ought to cease." When the Police Bill was before the Su Council, the late Sir Bartle Frere—after observing that one thing to lay down a principle and another to act u once and entirely, when it was opposed to the existi to existing forms of procedure and to prejudices of lo —advocated the acceptance of the proposed measu pointed out that even in England it took time to principle when once admitted, and "hoped that period the principle would be acted upon thr completely as his hon. friend" (the member f desire." When, therefore, it is now propose

of executive from judicial functions should be completely carried out in Lower Bengal by relieving the District Officer of judicial authority, the proposal is not a new one; it is merely the revival of a question which was exhaustively discussed and conclusively settled five-and-thirty years ago.

The contention of those who have now revived this question is substantially this—that the time has come for completing in Lower Bengal the work begun and left unfinished in 1860-1; that this completion is for many reasons very desirable and is now practicable. One of these reasons, advanced by Mr. Manomohan Ghose, is that the union of executive and judicial functions in the District Officer has led to many cases of hardship, injustice and public scandal, which tend to diminish the confidence of the Native public in the administration of justice. He has brought forward twenty-one cases in support of his allegation, all of which occurred within his own experience as an Advocate of the Calcutta High Court, and the facts of which are given in some detail. Sir Charles Elliott, the late Lieutenant-Governor of Bengal, in the October number of this Review, has published an answer to Mr. Manomohan Ghose in which he endeavours to show (1) that the existing system, under which executive and judicial powers are united in the District Officer, has great merits and advantages: (2) that it in no way trenches on the judicial independence of the Subordinate Magistrates: (3) that [illegible] are weighty arguments against its modification besides [illegible] arising from financial considerations: (4) that no valid [illegible]s been adduced of any evil arising from it.

[illegible] nderstands the objections made to the present system [illegible]cted against two items in the District Magistrate's [illegible]rst, that being the executive head of the District, [illegible] control of the police, he has the power of trying [illegible] and *second*, that the Subordinate Magistrates, [illegible]reat majority of cases, are directly under him, [illegible]m him, and look to him for such reports on [illegible] capacity as may expedite their promotion— [illegible] that his opponents must be strictly tie[illegible]

down to these two points, he proceeds to examine Mr. Ghose's twenty-one cases upon this restricted purview. He minimises, explains away, or concludes to be irrelevant, the whole of these cases with a single exception, and in this exceptional case he puts the blame not upon the system, but upon an exceptionally bad Magistrate.

The two points, to which Sir Charles Elliott limits his examination of the question, might perhaps be more accurately stated thus: (1) the District Magistrate being also head of the Police, head of the Revenue department, and of other Executive departments, having in many instances directed a criminal prosecution in his executive capacity, has improperly himself passed judicial orders in the case; or (2) having transferred the case to a Subordinate Magistrate, subordinate to himself, judicially and executively, has given to this Subordinate depending on him for character and promotion, instructions which have had the effect of interfering with such subordinate's judicial discretion to the prejudice of the accused.

But in truth the two points, however stated, are merely matter of evidence upon the broader issue, which is the proper one—was the union of executive and judicial powers in the District Officer the cause or contributory cause of any of the scandals which have occurred—would the separation of these functions have prevented or rendered less likely the occurrence of these scandals or any of them? It is submitted that a dispassionate examination of the cases, with the aid of c tent knowledge, cannot lead to other than an affi finding on this issue.

It is not possible within the limits of this paper the merits of all the cases and the soundness of the adopted by Sir Charles Elliott. Criticism must, restricted to a few of them. In case No. 3 the I trate wrote to a Subordinate Magistrate that certain case ought to be punished with the n the law allows. This instruction, which have been qualified by the words, "if con

dence," is justified on the ground that when some classes of cases become exceedingly rife, such an instruction may be expedient. It is not alleged, and there is nothing to show, that the particular case came within this category. An abstract suggestion as to the necessity of exemplary punishment in order to put down a class of crime that had alarmingly increased may be defensible: but whether such a concrete instruction as the above in a particular case was an improper interference with the judicial discretion of the Magistrate who was trying that case and knew the facts, there cannot be two opinions.

As to the Krishnagarh Students' Case, Sir Charles Elliott says:—"The Lieutenant-Governor" (Sir Rivers Thompson, the excellence of whose judgment will not be disputed) "condemned his" (the District Magistrate's) "conduct in no measured terms, but the fault he found with him was not high-handedness or interference with the judicial independence of subordinates, but want of judgment and discretion, and failure to exercise any real control over the case. The story is, therefore, hardly relevant to the question at issue." With this compare the following passage from that part of the Lieutenant-Governor's Resolution which dealt with the conduct of the Magistrate who tried the case: "The decision come to by him was undoubtedly correct, and, *having regard to the official pressure exerted for a conviction*, even if only with the idea of a nominal penalty, it is clear that the right result of the case does much credit to his tiality and firmness."

ling with the Jamalpore Mela Case, Sir Charles Elliott s that the censure of the *then* Lieutenant-Governor did e to the District Magistrate any misuse of judicial contends that the words of the Resolution—"In the e Lieutenant-Governor these proceedings involved se of judicial authority"—were not intended to istrict Magistrate. The whole context shows tended to apply. Sir Charles Elliott thinks the Magistrate did not "charge" him "with ich he could not commit, if the views of

those who support the separation of his judicial and executive functions were carried into effect." But the conclusion of the head of the Local Government who had to deal with the case was : "The whole case is a striking illustration of the danger and inconvenience of the union of executive and judicial functions in the same officer. . . . . . It is clear to the Lieutenant-Governor that years of patient and careful working on proper lines can scarcely undo the mischief and remove the prejudice against the existing system produced by a single case like the present."

If every prosecution, directed by the District Officer in his executive capacity, had to be initiated by complaint before an independent Magistrate, as every civil suit in which Government is plaintiff has to be instituted by filing a plaint before an independent Civil Judge ; and if every step in furtherance of the prosecution had to be taken upon the application of the Government Pleader—none of the scandals, which Mr. Ghose has collected, would have taken place. The fact that no such cases have occurred in the Presidency City, where executive and judicial functions are separated, supports this opinion.

Sir Charles Elliott disparages the evidence supplied by Mr. Manomohan Ghose's cases on the ground of the paucity of instances—a fair argument, if it could be safely assumed that there were no more than some twenty cases in as many years. But this assumption cannot be made. The experiences of a single barrister only have been published, and he declar[illegible] they are not all that he could produce. In most of the[illegible] men of wealth or position were concerned, who co[illegible] to seek the higher authorities with the aid of [illegible] advice. Those who have lived in the districts [illegible] supposition that no other such cases have occurre[illegible] others have become publicly known or notori[illegible] evidence, as it stands, there is enough to sh[illegible] has resulted from the union of executive an[illegible] in the same officer.

It will now be convenient to examine

merits and advantages of the existing system; and what are the weighty arguments against its modification besides those arising from financial considerations. "In the first place, then," says Sir Charles Elliott, "I would point out that the keynote to our success in Indian administration has been the adoption of the Oriental view that all power should be collected in the hands of a single official, so that the people of the District should be able to look up to one man in whom the various branches of authority are centred, and who is the visible representative of Government." This wide postulate, embracing the whole of India, cannot be conceded. Of necessity we had to work on Oriental lines at the beginning, when we knew little of the people, and even if we had the machinery of another system ready for use (which we had not), would have been unwise to use it. Our earliest system in many provinces was quasi-military, and, therefore, wholly in accord with the concentration of power in the hands of a single head. Progress has, however, in India, as in other countries, necessitated the division of labour inseparable from advancing civilisation, and step by step we have been getting further away from the original prototype, so far away indeed that the Municipal Government of advanced England has been considered suitable for introduction into India.

In Lower Bengal, with which alone we are at present concerned, the conception of the District Officer as the visible in-
...ion of all power never existed, as will be abundantly
on a study of the history of these provinces, and of the
...ninistrative changes made before 1793, and then, and
...ly. When the Company stood forth as Díwán, the
...of administration were followed; and the same
...udge, Magistrate, and Collector for a brief period.
...system was, however, even then found im-
..., and was soon abandoned. The administra-
...was placed in separate hands. Then there
...ourts for the weightier cases, civil and
...-Magistrate dealt with the lighter cases in

the District. Some years later provision was made for the appointment of separate Magistrates. In 1821 the appointment of the same person to be Magistrate and Collector was legalised, but it was not till 1831 that the two offices were united. In 1837 they were separated, and in 1859 they were again united. Courts of Circuit, the Superintendent of Police and various Commissioners from time to time exercised large portions of executive and judicial power; and the right of appeal in most matters, civil, criminal and revenue, very practically interfered with that monotheistic incarnation, in which enthusiasts would have it that the people believed.

The argument from prestige has been abandoned since Lord Kimberley repudiated it in the debate in the House of Lords; but, though the term itself has been discarded, those familiar with the discussion will recognise the substance of the old argument in what Sir Charles Elliott has advanced to support his conclusion that the District Magistrate, who is the eye and ear of Government, should hold in his hands all the threads of the different branches of the administration, and should have the officials in all those branches under his general control. There is a limit to the number of reins that can be grasped in a single hand—to the number of horses that can be driven by the best whip—and if this limit be disregarded, the safety of the coach will be endangered. The patriarchal system was never suited to Lower Bengal; the progress of every decade has increased its unsuitability. Within the l
five-and-thirty years the executive duties of the Distric
have increased enormously. Notoriously he has bee
to find time to discharge judicial functions. His
of practice: and when executive zeal, taken out o
priate sphere, is on a sudden and unusual occa
circumstances of which must give a bias to
purpose, applied without the light of daily ex
diverse in their nature, it is the fault not of
of the system that things go wrong. Mo
ago Sir George Campbell, when Lie

Bengal, realised this and would have relieved the District Officer of judicial functions in order to strengthen the executive —a wiser course without doubt than the retention of duties which he has no time to perform.

"In India," says Sir Charles Elliott, "we want good all-round men, not experts in technical minutiæ, nor *homines unius libri.*" There is an old saying that a Jack-of-all-trades is master of none. A good all-round man is excellently well-suited for newly-annexed, or backward or savage districts. In Lower Bengal (India is too wide for this paper) such an officer most effectively administers the Sonthal Pergunnahs, the Chittagong Hill Tracts, and the Hill Tribes of Orissa; but in the Presidency Division he is as great an anachronism, as to the modern traveller the palanquin in which the subaltern travelled up the Grand Trunk Road to join his regiment in the early days of the century.

Let us pass to the other merits and advantages claimed for the existing system. Although it is conceded that "the District Magistrate does as a matter of fact try so few cases that no very serious evil would ensue if he did not possess the power," still it is urged that he ought to retain this power that he may be able to try certain classes of offences, such as those committed by Europeans, which under the law a Native Subordinate Magistrate cannot try; and political *causes celebres,* in which a native might be suspected of bias or of weakness. 'hose are the very last cases that should be taken up by an vhose hands are full of other business, and whose want umiliarity with practice and procedure is likely to result s, to which the occasion attracts public attention, ' 'ılly when skilled advocates of the High Court are n. In most districts there are one or more istrates—the Joint-Magistrate generally deals 'mportant criminal cases. In any practical 'on European Magistrates would find a place, outed, upon occasion arising, to any small such is usually stationed.

Then it is said that the District Magistrate ought to retain his judicial powers that he may try difficult cases and set an example to his subordinates, who, being young and inexperienced, derive immense advantage in matters judicial from his advice, control and inspection. It is not easy to comprehend how the District Magistrate is to become expert in the science which he is here supposed to teach his pupils. Certainly the dramatic spectacle of this Officer, *in cathedrá*, surrounded by his subordinates, who have left their duties at the Treasury or in the Excise, or the Road Cess and other departments, to take a lesson in the administration of justice is scarcely within the possibilities of practical District Administration. If this mode of instruction be desirable, it might be obtained at least equally well by a visit to the Court of Session when sitting. Counsel and advice are excellent—when asked by one who, knowing the circumstances, understands his own difficulty—and a young inexperienced Magistrate will benefit by consultation with an experienced Senior, when he has reasonable doubt ; but advice and guidance are not beneficial, when not sought, but volunteered and impressed with the influence of superior official position. Mr. Manomohan's cases furnish many instances in which the Subordinate Magistrate, following his own instincts, would have been right, but was guided into the error by his superior.

Then as to that inspection, which is the breath of the nostrils of the Magistrate ; and of the paramount importance of whicl it is alleged that those who urge a change have lost sig said, that the Judge is not a peripatetic officer, and the Magistrate is—the Judge is tied to the Bench and th Magistrate is not ; and Sir Charles Elliott tells us th: ed every District Magistrate in Bengal to *send fr* over six cases decided by each of his Subordinate order to notice and warn them against irregu' growth of bad habits—an excellent direction, peripatetic District Officer could scarcely when riding *dak*, or acquaint himself wit

mere inspection of the *nathees** (unless, indeed, assisted by the Rontgen rays). He must sit down somewhere to read over the papers; and this he can better do in his private room at head-quarters than elsewhere. The Judge can do the same, and will bring superior knowledge to the examination. How, then, can it be said with any force of argument that the substitution of the Judge for the District Magistrate would defeat the ends in view? Further, the District and Sessions Judge *does* inspect in accordance with the directions of the High Court: and Sir Charles Elliott appears not to be aware of the extraordinary supervision and the control over the proceedings of the Subordinate Courts exercised by the so-called *English Department* of the High Court, under which errors of procedure and delay in disposing of cases cannot escape notice—supervision and control which have had the most successful results as regards the Civil Courts, and would, doubtless, have the same beneficial influence upon the inferior Criminal Courts.

Then we have the financial argument that the separation of executive and judicial function would, "in all but the largest districts necessitate a considerable increase of the existing staff of Subordinate Magistrates and their establishments, and would lead to great expansion in the number of District Judges." In 1860 the financial difficulty was the strongest argument advanced against complete separation: and ever since, as other means of defence have been weakened by time and progress, this big old gun has been brought out as an irresistible piece of artillery. ...ie has affected this also, and it can no longer do the old ...n. If the able men, who in 1860 were turned from fully ...ut a reform, of the excellence of which they were con... ...an impediment then insuperable, how would they ... could they have seen the impediment swept away ...venue flowing in from Court-fees—a revenue ... could have anticipated thirty-five years ago. ...uld cost a little, could not this little be spared

...undle of papers in a case fastened together by a string run

from the tax on justice, that justice may be done ? Very little (if any thing) would be required, if the reform were carried out by someone having knowledge of the existing system, and some faculty of organisation. Bearing in mind the economy that results from division of labour and the large existing establishments ready for re-arranging, it is by no means impossible that an actual saving could be effected. Certainly the reorganised system would be in a better position to deal with that increase of business in an increasing community, which at intervals makes demands for increased establishments impossible to resist.

In 1860, there was no settled procedure for the Criminal Courts in the districts. The substantive criminal law was indefinite, being contained in the "General Regulations," a chaos of legislation filling nine quarto volumes, partly repealed, partly amended and in part altered, until no man could say what was the law actually in force. In 1860-1 the Penal Code and the Code of Criminal Procedure, replacing this unintelligible mass, and containable in a single small volume, were promulgated. This small volume has been circulated in the English and Native languages through the length and breadth of the land, has been read and re-read by classes of remarkable intellectual avidity, stimulated by the cheapest educational facilities that ever a Government bestowed on its subjects. Railways and other improved means of communication have facilitated the spread of knowledge. The result is that a large educated class have become conversant with the law and procedure in matters criminal ; and are not only willing but competent to c the administration of criminal justice. They see their men on the Bench of the High Court not less compe Englishmen ; their awe of a superior race is being and taking us at our word they practice that equali have proclaimed. We profess to teach them to selves. They ask to be allowed in minor case criminal justice to themselves with proper safe High Court, as Sessions Judges, as Presid they have shown their capacity. The statesr

tual vision is not limited by the horizon of the system in which he had his first training, and who can see what progress demands, will not resist a concession to Native public opinion, which is now feasible, which cannot be shown upon any solid grounds of argument to be inexpedient, and for the expediency of which the most cogent reasons have been advanced.

## XVI.

To the Right Honourable
LORD GEORGE FRANCIS HAMILTON, M.P.,

*Her Majesty's Principal Secretary of State for India,*
*India Office, Whitehall, S.W.*

My Lord,

We the undersigned beg leave to submit to you, in the interests of the administration of justice, the following considerations in favour of the separation of judicial from executive duties in India. The present system, under which the chief executive official of a District collects the revenue, controls the police, institutes prosecutions, and at the same time exercises large judicial powers, has been, and still is, condemned not only by the general voice of public opinion in India, but also by Anglo-Indian officers, and by high legal authorities. The state of Indian opinion with reference to the question is so well known ... require neither proof nor illustration. The separation ...al and executive functions has been consistently urged ...t a long series of years alike by the Indian press and ... bodies and individuals well qualified to represent ... opinion. We propose, however, to refer briefly ... numerous occasions upon which the principle of ... been approved by official authorities; next, to ...e of the existing grievance, and the proposed ...ly, to discuss objections which have been or ... against alteration of the present system.

This Memorial, therefore, consists of three sections, which it may be convenient to indicate as follows :

(*a*) An Historical Retrospect (Paras. 2 to 10) ;

(*b*) The Existing Grievance, and the Remedy (Paras. 11 to 14) ;

(*c*) Answers to Possible Objections (Paras. 15 to 18).

(*a*)—AN HISTORICAL RETROSPECT.

2. So long ago as 1793 the Government of India, under Lord Cornwallis, recognised the dangers arising from the combination, in one and the same officer, of revenue with judicial duties. Section 1 of Regulation II., 1793, contained the following passage :

"All questions between Government and the landholders respecting the assessment and collection of the public revenue, and disputed claims between the latter and their rayats, or other persons concerned in the collection of their rents, have hitherto been cognizable in the Courts of *Maal Adawlut*, or Revenue Courts. The Collectors of the Revenue preside in these Courts as Judges, and an appeal lies from their decision to the Board of Revenue, and from the decrees of that Board to the Governor-General in Council in the Department of Revenue. The proprietors can never consider the privileges which have been conferred upon them as secure whilst the revenue officers are vested with these judicial powers. Exclusive of the objections arising to these Courts from their irregular, summary and often *ex parte* proceedings, and from the Collectors being obliged to suspend the exercise of their judicial functior ever they interfere with their financial duties, it is obv if the Regulations for assessing and collecting the pub are infringed, the revenue officers themselves r aggressors, and that individuals who have bee them in one capacity can never hope to obta them in another. Their financial occupations them for administering the laws between the and their tenants. Other security, therefo landed property and to the rights attac

desired improvements in agriculture can be expected to be effected. Government must divest itself of the power of infringing in its executive capacity the rights and privileges which, as exercising the legislative authority, it has conferred on the landholders. The revenue officers must be deprived of their judicial powers. All financial claims of the public, when disputed under the Regulations, must be subjected to the cognizance of the Courts of Judicature superintended by Judges who, from their official situations and the nature of their trusts, shall not only be wholly uninterested in the result of their decisions, but bound to decide impartially between the public and the proprietors of land, and also between the latter and their tenants. The Collectors of the Revenue must not only be divested of the power of deciding upon their own acts, but rendered amenable for them to the Courts of Judicature, and collect the public dues subject to a personal prosecution for every exaction exceeding the amount which they are authorised to demand on behalf of the public, and for every deviation from the Regulations prescribed for the collection of it. No power will then exist in the country by which the rights vested in the landholders by the Regulations can be infringed, or the value of landed property affected."

3. These observations aptly anticipated the basis of the criticisms which during the succeeding century have so often been passed, as well by individuals as by public bodies of the highest authority, upon the strange union of the functions of ...le and magistrate, public prosecutor and criminal judge, ...ollector and appeal court in revenue cases. In 1838 ...tee, appointed by the Government of Bengal to ...heme for the more efficient organisation of the ...d its report. As a member of that Committee ...Halliday (afterwards Sir Frederick Halliday, ...enant-Governor of Bengal and Member of ... Secretary of State) drew up an important ...fter citing at length the considerations that ... favour of separating police from judicial

duties in London, he stated that they applied with double force in India. The passage quoted with approval by Mr. Halliday declared that there was no more important principle in jurisprudence than the separation of the judicial from the executive ministerial functions; that a scheme to combine the duties of Judge and Sheriff, of Justice of the Peace and Constable in the same individuals would be scouted as absurd as well as mischievous; that a magistrate ought to have no previous knowledge of a matter with which he had to deal judicially; and that the whole executive duty of preventing and detecting crimes should be thrown upon the police. In support of the proposition that these remarks applied with double force to India, Mr. Halliday wrote:—

"In England a large majority of offenders are, as here, tried and sentenced by the magistrates: but in the former country the cases so tried are comparatively of a trivial and unimportant nature. In India the powers of the Magistrates are much greater; their sentences extend to imprisonment for three years, and their jurisdiction embraces offences which, both for frequency and importance, are, by far the weightiest subjects of the criminal administration of the country. The evil which this system produces is twofold: it affects the fair distribution of justice and it impairs at the same time the efficiency of the police. The union of Magistrate with Collector has been stigmatised as incompatible, but the junction of thief-catcher with judge is surely more anomalous in theory and more mischievous in practice. So long as it lasts, the public confidence in our criminal tribunals must always be [illegible] injury, and the authority of justice itself must often and misapplied. For this evil which arises from a co unavoidable bias against all supposed offenders, t appeal is not a sufficient remedy:—the danger to such circumstances, is not in a few cases, nor in of cases, but in every case. In all the Magist prosecutor and judge. If the appeal be ne justice in any case, it must be so in all: and

all sentences by a Magistrate should properly be revised by another authority, it would manifestly be for the public benefit that the appellate tribunal should decide all cases in the first instance. It is well known, on the other hand, that the judicial labours of a Magistrate occupy nearly all his time, that which is devoted to matters strictly executive being only the short space daily employed in hearing *thana* reports. But the effectual management of even a small police force, and the duties of a public prosecutor, ought to occupy the whole of one man's time, and the management of the police of a large district must necessarily be inefficient which, from press of other duties, is slurred over in two hasty hours of each day. I consider it then an indispensable preliminary to the improvement of our system that the duties of preventing crime and of apprehending and prosecuting offenders should, without delay, be separated from the judicial function."

4. Mr. Halliday's opinions on this subject were substantially approved by two other members of the Committee appointed by the Government of Bengal—Mr. W. W. Bird and Mr. J. Lowis. Mr. Bird, who was president of the Committee, stated that he had no objection to the disunion of executive from judicial functions. He added that he had invariably advocated the principle alike in the Revenue and the Judicial Departments, but as it was at that time pertinaciously disregarded in one department it could not very consistently be introduced into the other. Mr. Lowis characterized Mr. Halliday's proposals as "systemtic in plan, complete in detail, and sound in ." With reference to Mr. Bird's observation, just . Lowis said that it was fallacious "to aver that a om right principle in one branch of administration the sake of consistency, a departure from it in is true that Mr. Halliday, eighteen years later, view, and thought that British administration the Oriental idea of uniting all powers into is personal change of opinion does not affect er arguments.

5. Again, in 1854, in the course of a letter to the Government of India, Mr. C. Beadon, Secretary to the Government of Bengal, wrote :

"The only separation of functions which is really desirable is that of the executive and judicial, the one being a check upon the other ; and if the office of Magistrate and Collector be reconstituted on its former footing I think it will have to be considered whether . . . . the Magistrates should not be required to make over the greater portion of their judicial duties to qualified subordinates, devoting their own attention chiefly to police matters and the general executive management of their districts."

In November of the same year, as a Member of the Council of the Governor-General, the Hon. (afterwards Sir) J. P. Grant recorded a Minute in which he said that the combination of the duty of the Superintendent of Police and Public Prosecutor with the functions of a Criminal Judge was objectionable in principle, and the practical objections to it had been greatly aggravated by the course of legislation which had raised the judicial powers of a Magistrate six times higher than they were in the days of Lord Cornwallis. "It ought," Mr. Grant continued, "to be the fixed intention of the Government to dissever as soon as possible the functions of Criminal Judge from those of thief-catcher and Public Prosecutor, now combined in the office of Magistrate. That seems to me to be indispensable as a step towards any great improvement in our criminal jurisprudence."

6. Two years later—in September, 1856—a Despat ...ords of Court of Directors of the East India Company (No. 4 Department) on the re-organization of the Polic... pointed out that "to remedy the evils of the exis... the first step to be taken is, wherever the union at... to separate the police from the administration of t... . . . . . In the second place, the manageme... of each district should be taken out of ... Magistrate."

7. In February, 1857, a further Minute was recorded by the Hon. J. P. Grant, Member of the Council of the Governor-General, upon the "Union of the functions of Superintendent of Police with those of a Criminal Judge." Mr. Grant, in whose opinions Mr. (afterwards Sir Barnes) Peacock generally concurred, wrote :

"The one point for decision, as it appears to me, on which alone the whole question turns, is this—in which way is crime more certainly discovered, proved and punished, and innocence more certainly protected—when two men are occupied each as thief-catcher, prosecutor, and judge, or when one of them is occupied as thief-catcher and prosecutor, and the other as judge? I have no doubt that the principle of division of labour has all its general advantages, and an immense preponderance of special and peculiar advantages, when applied to this particular case; and I have no doubt that if there is any real difference between India and Europe in relation to this question, the difference is all in favour of relieving the Judge in India from all connexion with the detective officer and prosecutor. The judicial ermine is, in my judgment, out of place in the bye-ways of the detective policeman in any country, and those bye-ways in India are unusually dirty. Indeed, so strongly does this feeling operate, perhaps unconsciously, upon the English minds of the honourable body of men from whom our Magistrates are chosen, that in practice the real evil of the combination is, not that a Judge, whose mind has been put out of balance by his antecedents in relation to the prisoner, tries that ... but that the Superintendent of Police, whose nerve and ...re indispensable to the keeping of the native police ...order, abandons all real concern with the detection ...d the prosecution of criminals, in the mass of cases, ...s important and delicate duty almost wholly, in ...tive *darogahs*. . . . . If the combination theory ...n in reality—if an officer, after bribing spies, ...orrupt accomplices, laying himself out to hear ...e has to say, and putting his wit to the

utmost stretch, for weeks perhaps, in order to beat his adversary in the game of detection, were then to sit down gravely as a Judge, and were to profess to try dispassionately upon the evidence given in court the question of whether he or his adversary had won the game, I am well convinced that one or two cases of this sort would excite as much indignation as would save me the necessity of all argument *a priori* against the combination theory."

Unfortunately the theory has been acted upon in reality. Actual cases—more than one or two—have excited the vehement indignation against which Mr. Grant sought in 1857 to provide. Mr. Grant added that the objections to separation of judicial and police functions seemed to him, after the best attention he could give them, to be founded on imaginary evils. He refused to anticipate "such extreme antagonism between the native public officer and the native Judge as would be materially inconvenient." "Under a moderately sensible European Magistrate, controlled by an intelligent Commissioner, who would not talk or act as if police *peons* and *darogahs* were infallible, and dispassionate judges were never right, I cannot see why there should be any such consequences."

8. These, and similar, expressions of opinion were not lost upon the Government of India, as the history of the legislation which was undertaken immediately after the suppression of the Mutiny shows. In 1860 a Commission was appointed to enquire into the organisation of the Police. It consisted of representative officers from the North-West Provinces, Pegu, Bengal, Madras, the Punjab, and Oudh—"all," in the words of Sir Bartle Frere "men of ripe experience, especially i connected with Police." The Instructions issued to th sion contained the following propositions :

"The functions of a police are either protectiv sive or detective, to prevent crime and disorder criminals and disturbers of the peace. These no respect judicial. This rule requires a com the police from the judicial authorities, wheth

grade or the inferior magistracy in their judicial capacity. When, as is often the case in India, various functions are combined in the hands of one Magistrate, it may sometimes be difficult to observe this restriction ; but the rule should always be kept in sight that the official who collects and traces out the links in the chain of evidence in any case of importance should never be the same as the judicial officer, whether of high or inferior grade, who is to sit in judgment on the case. . . . It may sometimes be difficult to insist on this rule, but experience shows it is not nearly so difficult as would be supposed, and the advantages of insisting on it cannot be overstated." Again :

"The working police having its own officers exclusively engaged on their own duties in preventing or detecting crime, the question is, at what link in the chain of subordination between the highest and lowest officers in the executive administration is the police to be attached, and so made responsible as well as subordinate to all above that link in the chain ? The great object being to keep the judicial and police functions quite distinct, the most perfect organization is, no doubt, when the police is subordinate to none but that officer in the executive Government who is absolved from all judicial duty, or at least from all duty involving original jurisdiction, so that his judicial decisions can never be biassed by his duties as a Superintendent of police. . . . It is difficult to lay down any more definite rule as to the exact point where the subordination should commence than by saying that it should be so arranged that an officer should never be liable to try judicially important cases got up under his own directions as a police officer. . . . . . . es the question—Who is to be responsible for the peace . . . rict ? Clearly that officer, whoever he may be, to . . . olice are immediately responsible. Under him, it . . . every police officer and of every magisterial . . . ver grade, in their several charges, to keep him . . . matters affecting the public peace and the . . . etection of crime. It is his duty to see that . . . rs work together for this end ; as both are

subordinate to him, he ought to be able to ensure their combined action. The exact limits of the several duties of the two classes of officers it may be difficult to define in any general rule; but they will not be difficult to fix in practice if the leading principles are authoritatively laid down, and, above all, if the golden rule be borne in mind that the judicial and police functions are not to be mixed up or confounded, that the active work of preventing or detecting crime is to rest entirely with the police, and not to be interfered with by those who are to sit in judgment on the criminal."

9. The Police Commission in their Report (dated September, 1860) expressly recognised and accepted this "golden rule." Paragraph 27 of their Report was as follows:

"That as a rule there should be complete severance of executive police from judicial authorities; that the official who collects and traces out the links of evidence—in other words, virtually prosecutes the offender—should never be the same as the officer, whether of high or inferior grade, who is to sit in judgment on the case, even with a view to committal for trial before a higher tribunal. As the detection and prosecution of criminals properly devolve on the police, no police officer should be permitted to have any judicial function."

But although the Commission adopted without question the general principle that judicial and police functions ought not to be confounded, they proposed, as a matter of practical and temporary convenience, in view of "the constitution of the official agency" then existing in India, that an exception should be made in the case of the District Officer. The Commission did not maintain that the principle did not, in strictn[illegible]
to him. On the contrary, they appeared to have
pressly that it did. But they recommended that in
principle should, for the time being, be sacrificed
They reported:

"That the same true principle, that the jud[illegible]
officer should not be one and the same, [illegible]
having by law judicial functions, and shou[illegible]

be carefully observed in practice. But, with the constitution of the official agency now existing in India, an exception must be made in favour of the District Officer. The Magistrates have long been, in the eye of the law, executive officers, having a general supervising authority in matters of police, originally without extensive judicial powers. In some parts of India this original function of the Magistrates has not been widely departed from : in other parts extensive judicial powers have been superadded to their original and proper function. This circumstance has imported difficulties in regard to maintaining the leading principle enunciated above, for it is impracticable to relieve the Magistrates of their judicial duties ; and, on the other hand, it is at present inexpedient to deprive the police and public of the valuable aid and supervision of the District Officer in the general management of police matters."

The Commission recognised that this combination of judicial with police functions was open to objection, but looked forward to a time when improvements in organisation would, in actual practice, bring it to an end :—

"That this departure from principle will be less objectionable in practice when the executive police, though bound to obey the magistrate's orders *quoad* the criminal administration, is kept departmentally distinct and subordinate to its own officers, and constitutes a special agency having no judicial function. As the organization becomes perfected and the force effective for the performance of its detective duties, any necessity for the Magistrate to take personal action in any case judicially before him ought to cease."

The recommendations of the Police Commission were
the Government of India and, in accordance with
rtle Frere introduced in the Legislative Council on
1860, a Bill for the Better Regulation of Police.
the second reading of this measure, which after-
t V. of 1861, and is still in force, is important
he Government of India regarded the excep-
cial with police functions in the District

Officers a temporary compromise. Sir Barnes Peacock, the Vice-President of the Council, stated that he "had always been of opinion that a full and complete separation ought to be made between the two functions," while in reply to Mr. A. Sconce, who had argued that some passages in the Report of the Police Commission were at variance with the principle of separation, Sir Bartle Frere said :—

"It was one thing to lay down a principle and another to act on it at once and entirely when it was opposed to the existing system, to all existing forms of procedure, and to prejudice of long standing. Under such circumstances, it was often necessary to come to a compromise. . . . . He hoped that at no distant period the principle would be acted upon throughout India as completely as his hon. friend could desire. The hon. member had called the Bill a 'half-and-half' measure. He could assure the hon. gentleman that nobody was more inclined that it should be made a whole measure than he was, and he should be very glad if his hon. friend would only induce the Executive Governments to give it their support so as to effect a still more complete severance of the police and judicial functions than the Bill contemplated."

The hope expressed by Sir Bartle Frere in 1860 has yet to be fulfilled. It might have been realised in 1872, when the second Code of Criminal Procedure was passed. But the Government and the Legislature of the day were still under the dominion of the fallacy that all power must be centred in the District Magistrate, and the opportunity of applying the sound principle for which Sir Bartle Frere had contended was unfortunately rejected. In 1881 the Code of Crimina'
was further revised, and the Select Committee, in
on the Criminal Procedure Bill, said :—

"At the suggestion of the Government of Be
omitted section 38, conferring police powers o
We consider that it is inexpedient to invest M
such powers, or to make their connexion with
close than it is at present."

(*b*)—THE EXISTING GRIEVANCE, AND THE REMEDY.

11. The request which we have now the honour of urging is, therefore, that—in the words used by Sir J. P. Grant in 1854—the functions of criminal judge should be dissevered from those of thief-catcher and public prosecutor, or—in the words used by Sir Barnes Peacock in 1860—that a full and complete separation should be made between judicial and executive functions. At present these functions are to a great extent combined in India, especially in the case of the officers who in the Districts of Regulation Provinces are known as Collector-Magistrates, and in the non-Regulation Provinces are known as Deputy Commissioners. The duties of these officers are thus described by Sir W. W. Hunter* :—"As the name of Collector-Magistrate implies, his main functions are twofold. He is a fiscal officer, charged with the collection of the revenue from the land and other sources ; he also is a revenue and criminal judge, both of first instance and in appeal. But his title by no means exhausts his multifarious duties. He does in his smaller local sphere all that the Home Secretary superintends in England, and a great deal more ; for he is the representative of a paternal and not a constitutional government. Police, jails, education, municipalities, roads, sanitation, dispensaries, the local taxation, and the Imperial revenues of his District, are to him matters of daily concern." It is submitted that, just as Lord Cornwallis's Government held a century ago that the proprietors of land could never consider the privileges which had been conferred upon them as secure while the revenue officers were vested with judicial powers, so also the ... on of justice is brought into suspicion while judicial ... n in the hands of the detective and public prose-

... ounds upon which the request for full separation ... ficiently obvious. They have been anticipated ... nions already cited. It may, however, be con-

... e," p. 513 (3rd edition).

•venien* to summarize the arguments which have been advanced of late years by independent public opinion in India. These are to the effect (i) that the combination of judicial with executive duties in the same officer violates the first principles of equity ; (ii) that while a judicial officer ought to be thoroughly impartial and approach the consideration of any case without previous knowledge of the facts, an executive officer does not adequately discharge his duties unless his ears are open to all reports and information which he can in any degree employ for the benefit of his District (iii) that executive officers in India, being responsible for a large amount of miscellaneous business, have not time satisfactorily to dispose of judicial work in addition ; (iv) that, being keenly interested in carrying out particular measures, they are apt to be brought more or less into conflict with individuals, and, therefore, that it is inexpedient that they should also be invested with judicial powers ; (v) that under the existing system Collector-Magistrates do, in fact, neglect judicial for executive work ; (vi) that appeals from revenue assessments are apt to be futile when they are heard by revenue officers ; (vii) that great inconvenience, expense, and suffering are imposed upon suitors required to follow the camp of a judicial officer who, in the discharge of executive duties, is making a tour of his District ; and (viii) that the existing system not only involves all whom it concerns in hardship and inconvenience but also, by associating the judicial tribunal with the work of the police and of detectives, and by diminishing the safeguards afforded by the rules of evidence, produces actual miscarriages of justice and creates, although justice be done, opportunities of suspicion, distrust and discontent which are greatly to be deplored. There is, too, a further argument for the sep· tion, which arises out of the very nature of the work incide ligh to the judicial office, and which of itself might well be reg f the as conclusive in the matter. It is no longer open t ed and content ourselves with the pleasant belief that to an National man of good sense and education, with his ur— and quick apprehension of the just and the

is easir than the patriarchal administration of justice among oriental populations. The trial in Indian courts of justice of every grade must be carried out in the English method, and the judge or magistrate must proceed to his decision upon the basis of facts to be ascertained only through the examination and cross-examination before him of eye-witnesses testifying each to the relevant facts observed by him, and nothing more. It is not necessary for us to dwell on the importance of this procedure, nor is it too much to say that with this system of trial no judicial officer can efficiently perform his work otherwise than by close adherence to the methods and rules which the long experience of English lawyers has dictated, and of which he cannot hope to acquire a practical mastery, unless he makes the study and practice of them his serious business. In other words, it is essential to the proper and efficient—and we might add impartial—administration of justice that the judicial officer should be an expert specially educated and trained for the work of the court.

13. In Appendix B* to this Memorial summaries are given of various cases which, it is thought, illustrate in a striking way some of the dangers that arise from the present system. These cases of themselves might well remove—to adopt Sir J. P. Grant's words—"the necessity of argument *a priori* against the combination theory." But the present system is not merely objectionable on the ground that from time to time it is, and is clearly proved to be, responsible for a particular case of actual injustice. It is also objectionable on the ground that, so long as it exists, the general administration of justice is subjected to suspicion, and the strength and authority of the Government seriously impaired. For this reason it is submitted that ing short of complete separation of judicial from executive ions by legislation will remove the danger. Something, might be accomplished by purely executive measures. o doubt. might be accomplished by granting to accused ant cases, the option of standing their trial

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k. Ed.

before a Sessions Court. But these palliatives fall short of the only complete and satisfactory remedy, which is, by means of legislation, to make a clear line of division between the judicial and the executive duties now often combined in one and the same officer. So long as Collector-Magistrates have the power themselves to try, or to delegate to subordinates within their control, cases as to which they have taken action or received information in an Executive capacity, the administration of justice in India is not likely to command complete confidence and respect.

14. It would be easy to multipy expressions of authoritative opinion in support of the proposed reform. But, in view of the opinions already cited, it may be enough to add that, in a debate on the subject which took place in the Hous of Lords on May 8th, 1893, Lord Kimberley, then Secretary of State for India, and his predecessor, Lord Cross, showed their approval of the principle of separation in no ambiguous terms. Lord Cross said, on that occasion, that it would be, in his judgment, an "excellent plan" to separate judicial from executive function, and that it would "result in vast good to the Government of India." It was in the same spirit that Lord Dufferin, as Viceroy of India, referring to the proposal for separation put forward by the Indian National Congress, characterised it as a "counsel of perfection." Appendix A* to the present Memorial contains, *inter alia*, the favourable opinions of the Right Hon. Sir Richard Garth, late Chief Justice of Bengal, the Right Hon. Lord Hobhouse, Legal Member of the Viceroy's Council, 1872-77, the Right H. Sir Richard Couch, late Chief Justice of Bengal, Sir J. B. Phear, late Chief Justice of Ceylon, Sir R. T. Reid, Q.C., M.P., Attorney-General 1894-5, Sir William Markby, late Judge of the High Court, Calcutta, and Sir Raymond West, late Judge of the High Court, Bombay. These opinions were collected and compiled by the British Committee of the Indian National

* Book II., of this publication. Ed.

Congress, and, among other important indications of opinions prevalent in India, we beg to refer you to the series of resolutions adopted by the Indian National Congress—which Lord Lansdowne, as Viceroy, referred to in 1891 as a "perfectly legitimate movement" representing in India "what in Europe would be called the more advanced Liberal party." In 1886 the Congress adopted a resolution recording "an expression of the universal conviction that a complete separation of executive and judicial functions has become an urgent necessity", and urging the Government of India "to effect this separation without further delay." Similar resolutions were carried in 1887 and 1888, and the proposal formed in 1889, 1890, and 1891 the first section of an "omnibus" resolution affirming the resolutions of previous Congresses. In 1892 the Congress again carried a separate resolution on the question, adding to its original resolution a reference to "the serious mischief arising to the country from the combination of judicial and executive functions." In 1893 the resolution carried by the Congress was as follows—

"That this Congress, having now for many successive years vainly appealed to the Government of India to remove one of the gravest stigmas on British Rule in India, one fraught with incalculable oppression to all classes of the community throughout the country, now hopeless of any other redress, humbly entreats the Secretary of State for India to order the immediate appointment, in each province, of a Committee (one-half at least of whose members shall be non-official natives of India, qualified by education and experience in the workings of the various courts to deal with the question) to prepere each a scheme for the complete separation of all judicial and executive functions in their own provinces with as little additional cost to the State as may be practicable, and the submission of such schemes, with the comments of the several Indian Governments thereon, to himself, at some early date which he may be pleased to fix."

A similar resolution was carried in 1894, 1895, and 1896. ring recent years, also, practical schemes for saparation have

been laid before the Congress.

(*c*)—ANSWERS TO POSSIBLE OBJECTIONS.

15. The objections which, during the course of a century, have been urged against the separation of judicial and executive functions are reducible, on analysis, to three only : (i) that the system of combination works well, and is not responsible for miscarriage of justice ; (ii) that the system of combination, however indefensible it may seem to Western ideas, is necessary to the position, the authority, and, in a word, to the "prestige" of an Oriental officer ; and (iii) that separation of the two functions, though excellent in principle, would involve an additional expenditure which is, in fact, prohibitive in the present condition of the Indian finances.

16. It is obvious that the first objection is incompatible with the other two objections. It is one thing to defend the existing system on its merits : it is another thing to say that, although it is bad, it would be too dangerous or too costly to reform it. The first objection is an allegation of fact. The answer —and, it is submitted, the irresistible answer—is to be found in the cases which are set forth in Appendix B to this Memorial. These cases are but typical examples taken from a large number. It may be added that, among the leading advocates of separation in India, are Indian barristers of long and varied experience in the Courts who are able to testify, from personal knowledge, to the mischievous results of the present system. Their evidence is confirmed, also from personal knowledge, by many Anglo-Indian Judges of long experience.

17. The second objection—that the combination of judicial and executive functions is necessary to the "prestige" of an Oriental officer—is perhaps more difficult to handle. For reasons which are easy to understand, it is not often put forward in public and authoritative statements. But it is common in the Anglo-Indian press, it finds its way into magazine articles written by returned officers, and in India it is believed, rightly or wrongly, to lie at the [illegible] of [illegible]

the apologies for the present system. It has been said that Oriental ideas require in an officer entrusted with large executive duties the further power of inflicting punishment on individuals. If the proposition were true, it would be natural to expect that the existing system would be supported and defended by independent public opinion in India instead of being—as it is—deplored and condemned. It is not reasonable to assume that the Indian of to-day demands in the responsible officers of a civilised Government a combination of functions which at an earlier time an arbitrary despot may have enforced. The further contention that a District Magistrate ought to have the power of inflicting punishment because he is the local representative of the Sovereign appears to be based upon a fallacy and a misapprehension. The power of inflicting punishment is, indeed, part of the attributes of Sovereignty. But is not, on that ground, any more necessary that the power should be exercised by a Collector-Magistrate, who is head of the police and the revenue-system, than that it should be exercised by the Sovereign in person. The same reasoning, if it were accepted, would require that the Viceroy should be invested with the powers of a criminal judge. But it is not suggested that the Viceroy's "prestige" is lower than the "prestige" of a District Judge because the Judge passes sentences upon guilty persons and the Viceroy does not. It is equally a misapprehension to assume that those who urge the separation of judicial from executive duties desire the suppression or extinction of legitimate authority. They ask merely for a division of labour. The truth seems to be that the somewhat vague considerations which are put forward in defence of the existing system on the ground that it is necessary to the due authority of a District Magistrate had their origin in the prejudices and the customs of earlier times, revived, to some extent, in the unsettled period which followed the Indian Mutiny. We venture to submit that these considerations are not only groundless and misplaced, but that the authority of Government, far from being weakened by the equitable division of judicial

and executive duties, would be incalculably strengthened by the reform of a system which is at present responsible for many judicial scandals.

18. The financial objection alone remains, and it is upon this objection that responsible authorities appear to rely. When Lord Dufferin described the proposal for separation as a "counsel of perfection," he added that the condition of Indian finance prevented it, at that time, from being adopted. Similarly, in the debate in the House of Lords on May 8th, 1893, to which reference has already been made, Lord Kimberley, then Secretary of State, said :

"The difficulty is simply this, that if you were to alter the present system in India you would have to double the staff throughout the country ;"

and his predecessor, Lord Cross, said :—

"It [the main principle raised in the discussion] is a matter of the gravest possible importance, but I can only agree with what my noble friend has stated, that in the present state of the finances of India it is absolutely impossible to carry out that plan, which to my mind would be an excellent one, resulting in vast good to the Government of India."

The best answer to this objection is to be found in the scheme for separation drawn up in 1893 by Mr. Romesh Chandra Dutt, C. I. E., late Commissioner of the Orissa Division (at that time District Magistrate of Midnapur) and printed in Appendix A to this Memorial. In these circumstances it is not necessary to argue either (i) that any expense which the separation of judicial from executive duties might involve would be borne, and borne cheerfully, by the people of India ; or (ii) that it might well be met by economies in certain other directions. Mr. Dutt shows that the separation might be effected by a simple rearrangement of the existing staff, without any additional expense whatsoever. Mr. Dutt's scheme refers specially to Bengal, the Presidency, that is, for which the reform had been described as impracticable on the ground of cost. Similar schemes for other Presidencies

and Provinces have been framed, but it was understood that the most serious financial difficulty was apprehended in Bengal.

19. In view of the foregoing considerations we earnestly trust that you will direct the Government of India to prepare a scheme for the complete separation of judicial and executive functions, and to report upon this urgently pressing question at an early date.

We have the honour to be, Sir,

Your obedient Servants,

HOBHOUSE,
RICHARD GARTH,
RICHARD COUCH,
CHARLES SARGENT,
WILLIAM MARKBY,
JOHN BUDD PHEAR,
J. SCOTT,
W. WEDDERBURN,
ROLAND K. WILSON,
HERBERT J. REYNOLDS.

*July 1, 1899.*

# APPENDIX A

# INTRODUCTORY NOTE

The recent agitation in England regarding the necessity of separating judicial from executive functions as regards the trial of criminal cases by Magistrates in India, and the publication of a Memorandum on the subject by the British Committee of the Indian National Congress in London, have suggested to me the desirability of publishing a compilation of a few striking cases which illustrate the evils of the present system. Such a compilation in order to be useful, ought not, in my opinion, to be published anonymously, but some one cognisant of the facts set forth should come forward to vouch for their accuracy, and to guarantee that every statement of fact made is strictly correct. I have accordingly thought it necessary to give my own name to this publication and to confine myself to giving summaries of such cases only as have passed through my own hands professionally or otherwise, and copies of the records of which I have myself read and preserved in manuscript or in print.

Within a very short time of my commencing practice at the Bar in Calcutta in 1867, I was much struck with the frequency of cases involving gross abuse of judicial power on the part of the Magistracy in the interior of Bengal, and I soon discovered that it was the system and not the individual officers concerned, which was primarily responsible for the frequency of these cases. Unfortunately I did not think of preserving my briefs until the year 1874, or I could have included several instances which occurred prior to that year, the facts of which in some respects were just as striking as any of those now given.

A period of 20 years, however, is long enough for my purpose, but I must guard against its being supposed that I have included all or nearly all the cases bearing on the subject in which I have been myself professionally engaged during

these 20 years. I have omitted all petty cases of almost every day occurrence, and I have likewise not included those which have occurred in the other Presidencies of India, or even in Bengal, the facts of which I am not personally in a position to speak to, but of which the newspapers have been full during the last 20 years.

It is not difficult to imagine how shocked an Englishman brought up in the pure and healthy atmosphere of English Courts of Justice must feel when he reads the facts of any one of these 20 cases which are now presented to the public; but the most unfortunate feature in the whole of this controversy is that there are still many eminent members of the Executive Branch of the Indian Civil Service, who seek to minimise the evils of the present system, and to uphold it on various grounds of State Policy. They have themselves been brought up and trained from their early youth under a system which they imagine gives them a hold over the population of this country, though such a system wholly militates against all English ideas of judicial fairness and propriety, and is utterly subversive of that confidence which the native population ought to feel in the purity of British Justice. On the other hand to the credit of the Service, it must be acknowledged that several equally eminent members of that body, though themselves brought up in the same way, have from time to time protested against this system, and strongly urged the very reform which we are now seeking. In a separate pamphlet,* which I am placing before the public, will be found in a collected form, all the opinions I have been able to collect of numerous Anglo-Indian authorities extending over nearly a century (from 1793 to 1883), and these opinions both for and against the present system will enable the reader to understand the history of this question in India.

In the present compilation I have thought it fit to omit the names of the several officers concerned and have described

* Book I of this publication. Ed.

them throughout by their initials, because I do not wish it to be supposed that I have the least intention of exposing or attacking any individual officer. I am concerned only with the system, and I believe the real objection on the part of those who seek to uphold the present system, is not based, as is sometimes alleged, on the ground of increased expenditure, but on an apprehension that the prestige and influence of District Magistrates are likely to suffer if they are deprived of all judicial powers. Some of the opinions collected by me will show that I am quite right in entertaining this belief. I would therefore draw attention to the cases in this compilation to show what is really meant by "the prestige and influence of the magistracy" by some of those who are strenuously opposed to any reform on this ground.

A perusal of these 20 cases will satisfy any unprejudiced mind that the tendency of a system under which such cases as these are possible must be to demoralise the majority of young men whom England sends out to this country every year to administer justice. Nevertheless, I gladly take this opportunity of asserting that in spite of such a system, the early training which our young Civil Servants receive in a purer and healthier judicial atmosphere before they come out enables some of them to resist the baneful influences incidental to the present system, and to become exemplary judges in after life, as well as to exhibit that thorough honesty of purpose and independence of the executive which are so essential for the efficient administration of justice.

I wish it were possible for me to say the same of a large class of my own countrymen brought up in this country, who are entrusted with the trial of the bulk of magisterial cases. The effect upon them of the present system is simply disastrous, and it is with regret I confess, as the result of nearly 30 years' experience of the Criminal Courts in Bengal, that if I happened to be professionally engaged for the defence in a case in which I had reason to suspect that the District Magistrate was interested in the prosecution, I would unhesitatingly prefer that the

case should be tried by a covenanted Subordinate Magistrate who had received his early training in England rather than by a Deputy Magistrate brought up in this country. I am certain that nine out of every ten such subordinate Deputy Magistrates would feel bound to decide the case not upon the value of the evidence adduced, but according to the supposed wishes of the District Magistrate. A perusal of these cases will, I think, show that I have ample grounds for this opinion.

On a recent occasion the present Lieutenant-Governor of Bengal, Sir Alexander Mackenzie, while replying to an address presented to him by a public body, is reported to have made the following remarks with reference to the demand for this reform :—

"All that the laborious collection of what they term 'scandalous incidents' proves is that young Magistrates of the present day are not always as judicious as men of riper experience and longer training might be expected to be * * * Far too much is sought to be made of occasional errors of judgment or crudity of operation due to inexperience." With reference to the above remarks, I think it right to say, that the District Magistrates concerned in these 20 cases are not generally young and inexperienced officers whose youthful indiscretions might be attributed to individual temperament or inexperience, but that with the exception of two or three instances, all the District Magistrates in these cases were senior officers of standing, and that some of them were even about to retire on pension. It is, I think, useless to urge that the present system is not directly and mainly responsible for such cases.

17, THEATRE ROAD, CALCUTTA,<br>*15th July, 1896.*

**MANOMOHAN GHOSE**

NOTES OF CASES ILLUSTRATING THE EVILS OF THE PRESENT SYSTEM. *(Compiled by the late* MR. MANOMOHAN GHOSE, *of Lincoln's Inn, Barrister-at-Law, and Advocate of the High Court of Bengal.)*

## I.—CASE OE LAL CHAND CHOWDRY OF CHITTAGONG (1876.)

Babu Lal Chand Chowdry was a Municipal Commissioner and an Honorary Magistrate in Chittagong. The District Magistrate, as Chairman of the Municipality, had proposed the enactment of certain bye-laws to which several of the Municipal Commissioners, including Lal Chand Chowdry, were opposed; but eventually the bye-laws were carried by the casting vote of the Chairman. Lal Chand Chowdry incurred the displeasure of the District Magistrate by opposing the bye-laws. On the 24th April, 1876, a discussion took place at the Municipal Board regarding the proper construction of one of the bye-laws relating to certain latrine arrangements for the town, and on a vote being taken Lal Chand Chowdry refused to vote, as he was altogether opposed to the scheme proposed by the Chairman. Three days afterwards Mr. K., the Chairman and District Magistrate, appointed Lal Chand Chowdry a Special Constable under the Police Act V. of 1861, and directed him to watch twice during the day, and twice during the night, certain public latrines, as some of these had been burnt down, it was supposed, by incendiaries. Only those native members who were opposed to the bye-laws were, however, subjected to this indignity, to which they all had to submit. Lal Chand Chowdry and other members were directed by the Chairman to attend a meeting of a Financial Sub-Committee of the Municipality on the 1st May, 1876, and as Lal Chand entered the room in which the meeting was being held he was peremptorily ordered by the Chairman, in an insulting tone, to leave it. When he left, another member, Mr. Fuller, pointed out to the Chairman the impropriety of insulting a member in the manner Lal Chand Chowdry had been insulted. Whereupon the Chairman immediately threatened to have Lal Chand Chowdry arrested, saying: "I intended to insult him. I will issue a warrant against him and have him arrested. If you insist on having him at the table I must leave it."* This threat he proceeded to carry out the next day, after he found that Mr. Fuller and other members had declined to withdraw their motion for the repeal of the bye-laws of which Mr. Fuller had then given notice. On the 2nd May, without any complaint or

*Mr. Fuller's Affidavit.

charge, and acting under his extraordinary powers, the Magistrate of the District issued a warrant, in the first instance, for the arrest of Lal Chand Chowdry on charges under sections 143, 186, 189, 353, 505, 506 and 117 of the Penal Code, and Lal Chand Chowdry was arrested by the police on the same day, and subsequently released on bail. The next day the Magistrate, Mr. K., proceeded to try the case himself, rejecting two petitions which the accused presented, praying for time to enable his Counsel, for whom he had telegraphed, to come from Calcutta, and also for a transfer of the case to some other Magistrate. The evidence which Mr. K. recorded and which admittedly was in accordance with the information on the strength of which he had initiated the proceedings, was to the effect that after a certain meeting of the Municipality was over Lal Chand had expressed his disapproval of the bye-laws in strong language to some of his colleagues within the hearing of a number of men who had collected outside to know the result of the meeting. Mr. K., at the close of the case for the prosecution, framed three charges against the accused, and called upon him for his defence. At this stage the Counsel for the accused, arrived at Chittagong and moved the Sessions Judge to refer the proceedings to the High Court. The Judge made the order prayed for, remarking : "I have been myself through the evidence and do not find any evidence in support of the charges framed. . . . . The very utmost that can be said is that Babu Lal Chand made use of some imprudent expression in the excitement of a discussion with other Commissioners regarding certain bye-laws. . . . . It appears to me obvious that framing charges which are entirely unsupported by evidence, and calling on a defendant to answer to them, is unlawful." The Judge, however, being of opinion that the Magistrate should be given an opportunity of dropping these strange proceedings before sending the case up to the High Court, caused a copy of his judgment to be sent to the Commissioner and to the Magistrate, and the latter, on receipt of the Judge's order, expressed a wish to hear Counsel on behalf of the accused. The Counsel declined to enter into any defence, but simply pointed out to Mr. K. the illegality of his proceedings, whereupon Mr. K. dropped the case and aquitted the accused. The case caused considerable sensation at the time, and formed the subject of a strongly-worded resolution by the Lieutenant-Governor (Sir R. Temple), who ordered that Mr. K. should be degraded to the rank of a Joint-Magistrate, and debarred for ever from being in executive charge of a district. Mr. K. was accordingly transferred to the judical branch of the service, and was for many years a District Judge. The case subsequently went before the

Government of India, who considered the sentence of the Lieutenant-Governor, having regard to his findings, to be "lenient," but did not think it necessary to pass further orders.

This case also illustrates the danger of making the District Officer Chairman of the Municipality in the Mofussil.

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## II.—THE FENWA CASES. (1876-77)

These cases caused considerable sensation throughout Bengal in 1876-77. Mr. Webster, manager of the Fenwa Tea Garden, had gone with a large body of men to cut a *bund*, or embankment, which the villagers had put up, as they had a right to do, according to custom. The villagers, in large numbers, having raised an outcry against this act of oppression on the part of Mr. Webster, either he or one of his party (a European) fired his gun loaded with shot, and wounded several of the villagers. Mr. Webster's party then set fire to the sheds of the villagers and came away. On receipt of this information Mr. Rattray, the District Superintendent of Chittagong, after investigating the case, arrested Mr. Webster and sent him up on various charges. Mr. Webster was tried by a Subordinate Magistrate, Mr. Badcock, who convicted Mr. Webster and his companion, Mr. Macdonald, of the offence of rioting, but let them off with a fine.* The matter would have ended there, but for the zeal of Mr. K., the District Magistrate. This officer apparently became highly enraged at his friend Mr. Webster having been arrested by the District Superintendent, and he (Mr. K.), as head of the Police and as District Magistrate, wrote an elaborate memorandum censuring Mr. Rattray for having arrested Mr. Webster. In this memorandum Mr. K., of his own motion, directed three distinct prosecutions against the villagers, although no one had complained against them. It so happened that these ignorant villagers who had been severely wounded had deposed before Mr. Badcock in the case against Webster that it was the *Burra Saheb* of the Garden who had fired, meaning thereby the accused. Webster's defence, however, was that though he had headed the riot it was the *Chota Saheb* (Macdonald) who had actually fired the gun, and this defence was supported by the evidence of Macdonald, who was subsequently convicted by Mr. Badcock on his own statement. Mr. K., when reviewing the proceedings of Mr. Badcock, which were not judicially before him, and writing the memorandum above referred to directed these wounded men to be

*Webster was sentenced to pay a fine of Rs 500 and Macdonald to pay a fine Rs 100.

prosecuted for perjury for having stated that the *Burra Saheb* had fired the gun! Mr. K. further directed the villagers to be prosecuted for rioting in having resisted Mr. Webster, and for committing a public nuisance in having erected the embankment! The perjury and rioting cases were then made over by Mr. K. to Mr. Deputy Magistrate Sarson, who, seeing the villagers undefended, put a few questions to Mr. Webster and his witnesses, the answers to which clearly showed that the charges could not be sustained. Mr. Webster, it is said, informed Mr. K. that Mr. Sarson was likely to acquit the villagers. Mr. K. thereupon passed orders of his own motion, without any notice to the accused, transferring both the cases from the file of Mr. Sarson to that of the Joint-Magistrate Mr. V., who tried those cases as well as the nuisance case originated by Mr. K., and convicted the villagers in all the three cases, sentencing them in the perjury case to six months' rigorous imprisonment!! In the other two cases the villagers were sentenced to pay fines. The Sessions Judge having dismissed the appeal of the villagers, the cases were taken up by the Press in Calcutta, and Sir R. Temple, then Lieutenant-Governor, being convinced of the gross injustice which had been done to the rayats, directed the Legal Remembrancer to move the High Court for an enhancement of the sentences passed on Webster and Macdonald, and for the release of the villagers. A Bench of two Judges (Ainslie and Morris, J. J.) granted a rule calling upon Webster and Macdonald to show cause why the sentences passed on them by Mr. Badcock should not be enhanced, but declined to interfere on behalf of the rayats. An application was subsequently made by Counsél for the villagers before another Bench presided over by Mr. Justice Pontifex and Mr. Justice Birch, and those Judges ordered the villagers to be immediately released on bail. Subsequently all the cases were argued before three Judges of the High Court (Markby, Ainslie, and Morris, J.J.), who sentenced Webster and Macdonald to two months' rigorous imprisonment in addition to the fines originally imposed, and quashed the conviction of the villagers in the rioting case on the ground that the Magistrate, Mr. K., had acted illegally in transferring it from the file of Mr. Sarson without hearing the accused, and also quashed the conviction in the nuisance case on the ground that the charge was unsustainable having regard to the facts found by the convicting Magistrate themselves.

As regards the perjury case in which two of those judges had once declined to interfere on the application of the Government, the Court, without expressing any opinion on the merits, simply ordered the discharge of the prisoners, on the ground that, even if guilty, they had been

sufficiently punished—a decision which caused great public dissatisfaction at the time.

Few cases have caused greater scandal than the Fenwa cases, the facts of which are very briefly given above. But for the executive memorandum of Mr. K. (the District Magistrate) and his wholly unjust and indefensible action in the matter, no proceedings would have been taken against the villagers, and they certainly would not have been convicted or sent to jail if he had not at the last moment transferred the cases to a friend and Subordinate Magistrate, who probably felt himself bound to carry out the views of his official superior. Upon the facts found by the Joint-Magistrate himself no charge of rioting or nuisance was sustainable in law, and as regards the perjury, even if the ignorant and wounded villagers had misdescribed one European for another, no magistrate, unless improperly influenced, would have sent them to prison for such a long term under the circumstances of the case.

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## III.—THE CASE OF BARADA KANT ROY. (1877)

An application was made by Counsel before Markby and Mitter, J.J., for the transfer of a case from the Court of the Deputy Magistrate of Patuakhali in Backergunj, in which a zemindar named Barada Kant Roy was one of the accused. One of the grounds for the transfer was that the Magistrate of the District, Mr. B., had written to the Deputy Magistrate a letter to the effect that the accused ought to be sentenced to the maximum term provided for in the section under which they were charged. A certified copy of this letter was annexed to the petition to the High Court, the Deputy Magistrate having himself given a copy of the letter, treating it as an official document. The case was transferred.

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## IV.—THE MURSHIDABAD FISHERY CASE. (1879)

In April, 1879, Mr. M., Collector and District Magistrate of Murshidabad, gave on behalf of the Government a lease of a certain fishery regarding which there had been some boundary disputes with the proprietors of a neighbouring fishery. The ostensible lessee was one Lahoree, but, as it afterwards transpired, the real lessee was one of Mr. M.'s own subordinate ministerial officers, who could not have legally taken the lease in his own name. The nominal lessee soon afterwards preferred a charge of theft against certain fishermen on the allegation that they had caught fish within the boundaries of this fishery. This case was tried by a Bengali Deputy Magistrate. The fishermen who had

been accused of theft stated they had been catching fish for many years past within the disputed fishery, and Mr. M.'s lessee having admitted that he had never been in actual possession of this portion of the fishery, the Deputy Magistrate called upon the complainant to show cause why his complaint should not be dismissed. The complainant then urged that, as the Government was interested in the result of the case, the Government Pleader should be instructed to appear on his behalf. The Deputy Magistrate thereupon wrote to Mr. M. (who as Collector represented the Government) that "if he thought it necessary he might instruct the Government Pleader to appear for the complainant." Mr. M., however, did not think it necessary to instruct the Government Pleader, and passed a written order in Bengali, which ended thus: "It would be the duty of the Deputy Magistrate to keep an eye over the interests and cases of Government." Notwithstanding the plain hint contained in this order, the Deputy Magistrate subsequently dismissed the charge of theft, holding that, as the complainant had never been in possession, no such charge could be maintained. The complainant then applied to Mr. M., in his capacity as District Magistrate, to revive the case, alleging as one of the grounds "that in such cases, where the Government is a party, it is the duty of its officers to increase the boundaries of the fishery in possession." Mr. M., finding that under the Indian Criminal Procedure Code of 1872 he had no power under the circumstances to revive a case in which the accused had been discharged by another Magistrate, refused the application, but at the same time, of his own motion, instituted a fresh judicial enquiry regarding the possession of the disputed fishery under a summary power conferred by the Criminal Procedure Code, which, however, can be exercised only when there are grounds for believing that a breach of the peace is imminent. It was admitted that no one had suggested to Mr. M. any probability of a breach of the peace, nor was he himself able to state any grounds in the proceeding which he was required by law to record before he could have jurisdiction to enter upon such an enquiry. The fishermen protested against this new enquiry and against Mr. M. trying the case himself, he being manifestly interested in the result. Mr. M., however, refused to transfer the trial of the case to some other magistrate, which could have been easily done, and, although there was no evidence adduced on behalf of his own lessee regarding actual possession, directed, in spite of the contrary judicial finding of the Deputy Magistrate in the theft case, that the lessee should be maintained in possession as against everybody else. The fishermen then applied to the High Court to revise Mr. M.'s order, and that Court

quashed it on the ground that Mr. M.'s proceedings were entirely without jurisdiction. Mr. M., however, rendered the decision of the High Court nugatory by ordering the Police to prevent the fishermen from fishing in the disputed fishery and to arrest them on a charge of theft if they did so. He professed to do this in his excutive capacity. It was alleged by Mr. M. that when he first gave the lease he was not aware of the fact that his own subordinate officer was the real lessee, but it was admitted that he became aware of that fact before he instituted the enquiry into possession of the parties.

## V.—THE PURNEA INTIMIDATION CASE. (1881)

In July, 1881, a very extraordinary prosecution was started by Mr. W., District Magistrate of Purnea, the facts of which were published by the *Statesman* newspaper at the time.

A petition was presented by Mr. Taylor, Manager of the Estate of Rájá Lilanund Singh, to Mr. W., in which it was alleged that the Rájá had recently dismissed his Dewan Bhoobun Chunder Roy, who on hearing of his dismissal had remarked :—

"If any *fasád* (trouble, or row) takes place, who will be there to prevent it when I am gone?" The offence consisted in having uttered these words. On receipt of this petition Mr. W. also passed the following order :—

"Under Section 142, Criminal Procedure Code, I consider the offence suspected to have been committed should be enquired into. Warrant to issue for the arrest of Bhoobun Chunder Roy." The warrant issued specified an offence under Section 536 (Criminal Intimidation), and the case was by a written order transferred to the file of a Bengali Deputy Magistrate on the 26th July, 1881. After the transfer of the case, Mr. W. continued to pass written orders in the case for the guidance of the Deputy Magistrate, who said in open Court that he was bound to carry out Mr. W.'s orders. Mr. W. went on directing the Deputy Magistrate to examine the Rájá at his own house, although the accused objected to it, and Mr. W. also passed orders for the adjournment of the case, as if the officer trying the case was simply to carry out the orders of his official superior and had himself no voice in the matter at all. After the Rájá had been examined at length, the following dialogue took place between the Deputy Magistrate and the counsel for the accused, as reported in the *Statesman* of the 29th August, 1881 :—

Mr. Ghose then applied to the Deputy Magistrate to dismiss the case at once, on the ground that the evidence of the Rájá did not disclose any sort of criminal offence, and that the Magistrate of the district had acted illegally and without discretion in issuing a warrant without any evidence in such an utterly frivolous case. His client ought not, therefore, to be put to the expense of being compelled to go through the form of hearing the evidence of all the witnesses in such a case.

The Deputy Magistrate pointed out to Mr. Ghose that Section 147 of the Criminal Procedure Code (X of 1872) under which alone he could possibly act, contemplated a dismissal before the appearance of the accused. He therefore asked Mr. Ghose to point out under what section he was competent to dismiss the case at that stage.

Mr. Ghose: The Legislature evidently did not contemplate that any Magistrate of the district would ever think of issuing process under such circumstances. It would be monstrous if a Magistrate on finding even after the appearance of the accused that the case did not disclose any offence, were still bound to go through the ceremony of recording the evidence of numerous witnesses who could not possibly carry the case any further.

The Deputy Magistrate said he was bound by the terms of Explanation III. of Section 215 of the Criminal Procedure Code, unless Mr. Ghose could show some law to the contrary.

Although the Deputy Magistrate thought at the time that there was no case, he was powerless to drop it, and the trial was prolonged for several days, the accused being compelled to spend more than Rs. 10,000 in counsel's and pleader's fees, etc.

In the course of the subsequent proceedings Mr. W. kept on openly giving the Deputy Magistrate advice in writing as to the order in which certain witnesses should be examined, etc.; and when the counsel for the accused went to Mr. W. at the suggestion of the Deputy Magistrate himself, to remonstrate and respectfully protest against his interference, Mr. W. claimed the right to advise the Deputy Magistrate on the ground that he was his subordinate! At the conclusion of the case for the prosecution, the Deputy Magistrate went with the record to Mr. W.'s house to consult him, and then discharged the accused, holding that no offence had been disclosed! If the Deputy Magistrate had been left to himself, the case would have terminated much earlier, and saved the parties much expense and annoyance.

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## VI.—THE FURREEDPORE BRIBERY PROSECUTION. (1874)

In 1874, Mr. W., District Magistrate of Furreedpore, acting on some private or anonymous information, issued in his executive capacity a proclamation to the effect that if any person would come forward and admit that he had paid any illegal gratification to one Het Lal Roy, a clerk in the Police office, the informant would not be liable to any punishment. Mr. W. further directed the Police to collect evidence against the accused, and himself passed orders from time to time as to how the investigation was to be conducted. The result of this unusual proclamation in a district like Furreedpore was that more than fifty Police chaukidars and others came forward and stated that they had at different times paid small sums to the accused. Mr. W. made over some of these cases to a first class Subordinate Magistrate and some to a second-class Magistrate, and himself took an active part in prosecuting them. In some of them the accused was convicted by the Subordinate Magistrates, although there was nothing to corroborate the statements of the informers on whose evidence the convictions were based. As regards the convictions by the second-class Magistrate, the accused was only entitled to appeal to Mr. W. himself, and it would have been perfectly useless for him to have adopted that course. The accused accordingly moved the High Court to transfer his appeals to another district. At the hearing of the rule Mr. W. opposed it on the ground that his prestige as a District Officer would suffer if the appeals were transferred. The High Court, however, made the rule absolute, and transferred all the appeals to Backergunge (22 W. R., Cr. Rule 75). The appeals were eventually heard by the Sessions Judge of Backergunge afterwards Mr. Justice Tottenham), who acquitted Het Lal Roy in all he cases.

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## VII.—THE CASE OF RAMZAN ALI (1875)

A case in some respects similar to case No. 6. happened at Midnapore in 1875, in which the High Court was moved for a transfer of the appeals of the prisoner from the Court of Mr. H., the District Magistrate, who was the real prosecutor and who was the appellate authority, the case having been made over by him originally to a second-class Magistrate for trial. The appeals were transferred to the Judge. The judgment of the High Court will be found reported in 24 W. R., Cr. Rule 58. The following passage occurs in that judgment :—

"There is no doubt that he has, as Magistrate of the District, acted

zealously in the way of procuring the initiation of this very prosecution and many others of a like kind against the prisoner, and has in a manner taken upon himself (at the outset at least) the character of a prosecutor in it. It would, therefore, not be altogether seemly that the appeal from the Deputy Magistrate should be made to him, and as we understand his letter, it would appear that he naturally feels himself that that would be so."

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## VIII.—THE JUNGIPORE CASE.

In the district of Murshidabad a European indigo-planter had a dispute with a number of his rayats, who were not willing to sow indigo. Thereupon a series of criminal cases were instituted against the rayats by the planter, charging them with the forcible rescue of some of their cattle, which were about to be impounded on account of an alleged trespass on the factory grounds. These cases were tried by a Bengal Deputy Magistrate, who dismissed some of them, and in others convicted and fined the accused rayats, that being the usual sentence in such cases. The indigo-planter, however, was not satisfied with the punishment inflicted, and was supposed to have made some private representations to the Magistrate of the district. Anyhow, the District Magistrate, Mr. M., wrote several demi-official letters to the Deputy Magistrate finding fault with the sentences passed by him as being unduly lenient, and laying down certain instructions for his future guidance. Soon after there was a fresh case of the same kind before the same Deputy Magistrate, who on this occasion passed sentence exactly in accordance with the directions of the District Magistrate, quoting certain passages from the demi-official letter of that officer in justification of the unusual severity of the punishment inflicted. The convicted rayats then appealed to the Sessions Judge, who declared that the sentence passed was illegal, and reduced it to its proper limits. The District Magistrate, Mr. M., being informed of what had taken place, and annoyed at finding that his private instructions to the Deputy Magistrate had been disclosed, sent for the latter officer and told him that he had no business to refer to the demi-official letter. In the course of this conversation Mr. M. went so far as to characterise the conduct of the Deputy Magistrate as pure "*budzati*" (rascality).

This case caused a good deal of sensation by reason of the treatment which the Deputy Magistrate had received from Mr. M., and subsequently from the higher authorities, but it furnishes an illustration of

the manner in which the independence and discretion of Subordinate Magistrates are constantly interfered with by District Officers.

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## IX.—THE BHAGULPORE CASE. (1883)

In the year 1883 a very strange case occurred at Bhagulpore, in which a well-known and wealthy zemindar named Surdhari Lal had to apply to the High Court for redress. A dispute existed for some time between him and certain Muhammadans regarding a piece of land which had led to the institution of several cases between his men and the Muhammadans. Mr. S., the Magistrate of the District, in a private letter to the zemindar, had asked for a large sum of money (Rs. 20,000) for a public object, which request had not been complied with. He had also proposed in certain letters that the zemindar should sell his property to the Muhammadans for a small amount ; but the zemindar had not agreed to those terms. Mr. S. then wrote to the zemindar threatening to take action against him under section 144, Criminal Procedure Code, which authorises a magistrate by an executive order to "direct any person to abstain from a certain act, or to take certain order with certain property in his possession." Shortly before this a criminal charge had been preferred against the zemindar by the Muhammadans, and the Joint Magistrate of Bhagulpore had dismissed the complaint on the ground that he had made a full enquiry into the same facts in another case, and although the zemindar was not formerly a party to that proceeding, yet the facts disclosed in it clearly showed that neither he nor his men had done anything wrong. Mr. S. finding that the zeminder was reluctant to sell the property, revived, after the lapse of a month and a-half, the prosecution in that case, made it over to a Subordinate Deputy Magistrate, and directed the personal attendance of the zemindar, who lived in Calcutta. About this time, certain overtures were made by Mr. S., to the effect that, if the zemindar would sell the property, the prosecution would be withdrawn. But the zemindar, instead of yielding, moved the High Court, annexing to his affidavit the letters he had received from Mr. S. A rule was granted by the High Court calling upon the Magistrate to show cause why his proceedings should not be quashed, and, it being apparent that a discussion of the case in the High Court would lead to a great public scandal, the Legal Remembrancer consented to the order of Mr. S. reviving the prosecution being quashed without any argument ; and accordingly it was set aside by consent.

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## X.—THE MALDAH EMBANKMENT CASE. (1876)

As an illustration of the manner in which a strong executive officer vested with judicial powers sometimes acts in the Mofussil, the facts of the Maldah case, which occurred in 1876, may be given in the words of Mr. Justice Louis Jackson, one of the Judges who decided it in the High Court. The District Magistrate of Maldah, Mr. M., had summarily convicted two respectable inhabitants of the place and sentenced them to two months' rigorous imprisonment each, in consequence of some private information he had received from the Police, without allowing the accused any time to defend themselves. Mr. Justice Jackson in his judgment, dated 6th June 1876, in the case of *Pran Nath Shah* and *Roma Nath Bannerji*, said :—"From the letter which the Magistrate himself has addressed to the Registrar of this Court, and from the register (kept in summary cases), it appears that the Magistrate of the district having learnt, shortly after his arrival at the station at Maldah, *in a private conversation with the Assistant Magistrate and the Superintendent of Police*, that some persons were committing acts which, in their opinion, endangered the safety of a large public embankment, directed some enquiry to be made, and followed up that order by himself walking out the next morning in that direction. In the course of his walk he came upon the petitioner, who was at the time engaged in superintending some work, not on his own account, nor in the capacity of a servant or paid agent, but simply to oblige the owner, the Mahárájá of Burdwan ; and it appears from the terms of the conviction that, in the opinion of the Magistrate, the defendant had been 'proved conclusively to have cut away a part of the slope above the tope* for the purpose of erecting a house and extending a mangoe garden now belonging to the Mahárájá of Burdwan, for whom he appears to be acting.' .... "It is imposible to conceive that if a person engaged in laying out his garden and making the foundation for a house should, in so doing, encroach slightly on the inner slope of a large embankment, he can be supposed to be doing so with the intention of causing, or with the knowledge that he is likely to cause, wrongful loss or damage to anybody, especially when it is considered that the loss, if any, caused by the act would inevitably fall most severely on the person doing the act himself, because if the irruption which the Magistrate anticipates should occur in that place, it is the very garden and house in question which would be first exposed to the fury of the waters. This alone is, it appears to us,

* *Tope*, a clump or grove of trees.

enough to vitiate the conviction, and if there were nothing more to be said in this case, we should have felt it our duty to annul the conviction and set aside the sentence of the Magistrate ; but we think there is more to be said. In this case the complainant or the prosecutor set down is the Government. It does not appear that any information was laid by any person before the Magistrate against this particular petitioner, and the form of the register specifically states that the case was commenced without complaint, and therefore it is to the spontaneous action of the Magistrate himself that these proceedings are to be ascribed. Now, considering that the Magistrate himself was the prosecutor and himself dealt penally with the case, and considering the important nature of the case in the Magistrate's own view, it appears to us that this was not a case in which he ought to have acted under the summary procedure. *It certainly conveys an alarming picture of the insecurity of liberty in these districts, if a person of respectable position, engaged in a perfectly lawful occupation, which happens unfortunately to have an unsuspected tendency to promote danger to the public, should be surprised by the Magistrate in his work, taken into custody, and before he has time to turn round, sentenced to rigorous imprisonment for two months.* I cannot think that the Legislature intended to authorise summary procedure in such a case as this. These observations apply in precisely the same degree to the case of another petitioner also before us, viz., Pran Nath Shaha. But in his case there is a still further circumstance. He was also dealt with in the same manner, *was surprised in the course of the Magistrate's walk, brought before the Magistrate, and sentenced to two month's rigorous imprisonment ;* but three days after the conviction had taken place, he appears to have been served with a notice now before us, dated the 24th April, in which he was called upon forthwith to repair the damage which he had done to the public road by taking earth from its sides. Now, considering the proceedings taken, and the extremely severe sentence passed, there appears something like irony in this notice. We can quite understand that if the Magistrate is informed that a certain practice is dangerous to public security, he should enquire into the matter, give notice to all parties concerned to abstain from such practice, and warn them that any infraction of the notice should be severely dealt with : but it appears to us that to come suddenly upon these persons, take them into custody, and sentence them to rigorous imprisonment is, to say the least, the exercise of a misplaced rigour. We reverse the convictions in both these cases, and set aside the sentences." The passages printed in italics were not underlined by the Judges in the original judgment.

## XI.—THE LOKENATHPUR CASE. (1877)

The facts of this mysterious case, which happened in 1877-78, are as follows: On the 10th June, 1877, Mr. G., Manager of the Lokenathpur Factory, wrote the following letter to Mr. S., the Magistrate of the Chooadanga sub-division in Nuddea :—

"MY DEAR S——

"Ramgati Biswas, the Teshildar of Kooltolla, has been found over Rs.400 short of his collections, and I have a case ready to bring against him in your Court to-morrow. This morning at daylight his horse was found near the Boonapara line, and a saddle, a bridle, and some clothes, I suppose belonging to him, under a tree near the place; so something is up. I have given information to the police at Damoorhooda.

Yours sincerely,

"G. A. G——."

A few hours afterwards Mr. G. wrote another letter informing the same Magistrate that the police had found the body of Ramgati Biswas in a tank near the factory. The body was examined by a doctor, who declared that in his opinion the man had been killed before his body was thrown into the tank, while two men alleged that they had seen the deceased at the factory the preceding evening; one of them stated that he had accompanied the deceased to the factory, that the latter carried with him some ornaments in order to satisfy his debts to Mr. G., that Mr. G. refused to allow the deceased to leave the factory until he had paid the full amount of his debt, and that the witness returned home leaving the deceased in charge of the factory servants. The other witness stated that he had witnessed an altercation between Mr. G. and the deceased. Acting upon these statements and other evidence which seemed corroborative, Mr. S., the Magistrate, arrested the entire factory staff, with the exception of Mr. G. and his head native servant, who were, however, regarded in the light of accused persons.

The investigation into the circumstances attending the supposed murder was begun by the Police under the personal supervision of M. S., and in the course of this investigation certain statements in the nature of confessions were made by some of the prisoners. This enquiry was afterwards conducted by Mr. S. personally for several days, in the course of which he examined many witnesses, the evidence of some of whom clearly indicated that Ramgati Biswas' death must have been due to certain injuries which he had, in all probability, received at the Lokenathpur factory. About this time certain communications passed between Mr. S. and the District Magistrate and the Commissioner of the

Division the precise nature of which is not known ; and in the end Mr. S. discharged all the accused. The result of this elaborate enquiry was embodied not in a judgment, but in what Mr. S. called "an official report," and that result was to the effect that in his opinion Ramgati Biswas had deliberately and "maliciously" committed suicide by drowning himself, so that a false charge of murder might be brought against Mr. G. and his servants, although the medical evidence was to the effect that no water was found in the stomach of the deceased! Mr. S. further went on to suggest in this report that the two witnesses referred to above should be prosecuted for having given false evidence before him. These two persons were then prosecuted under orders of the District Magistrate, before Mr. T., Joint-Magistrate of Krishnagar, who convicted them of having given false information, although the depositions were not produced before him, and although it was not clear what was the precise character of the proceeding in which they had deposed, and sentenced them to three months' rigorous imprisonment. The conviction was also wholly unsustainable on the evidence. These two persons then appealed to the Sessions Judge of Nuddea, and on their appeal coming on for hearing, all public discussion of the case by their Counsel was avoided by the Government Pleader, who at the outset informed the Court, under instructions from the District Magistrate, that the conviction could not be supported, inasmuch as the record of Mr. S.'s enquiry could not be produced, and that it contained the depositions of witnesses as well as Mr. S.'s sanction for the prosecution which had not been put in at the trial. On the acquittal of these two persons, their Counsel moved the Judge to call for the record of the enquiry by Mr. S., and to set aside his order discharging the prisoners originally arrested on a charge of culpable homicide. The Sessions Judge was of opinion that the enquiry which Mr. S. had held, and which had terminated in the discharge of the prisoners, was by law a judicial proceeding, and as he thought that there were *primá facie* grounds for supposing that there had been a failure of justice, he called for the record of the enquiry under the provisions of the Code of Criminal Procedure. The District Magistrare (Mr. S—s), however, being of opinion that the enquiry by his subordinate Mr. S. was non-judicial, declined to comply with the Judge's order calling for the report, on the ground that the public interests would suffer by its production. The Judge was thereupon compelled to make a reference to the High Court on the subject, and that Court called for the proceedings of Mr. S. In the meantime, having regard to the public agitation on the subject, the Government

of Bengal was induced to publish this extraordinary record, omitting certain portions of Mr. S.'s report. Its publication, however, did not in the slightest degree allay the public excitement regarding the case, and the entire press condemned the proceedings of Mr. S, as having led to a scandalous failure of justice. An application was then made to the High Court to quash the finding of Mr. S., but that Court held that, although Mr. S.'s enquiry was, under the law, judicial, he was not bound to come to any finding when making an inquest, and that consequently his report was not a judicial document. (See I. L. R., 3 Cal. 742.)

The details of this case and its several episodes were severely commented upon by the press for many months in 1878, and were such as to throw great discredit upon the administration of criminal justice in this country. In the report submitted by Mr. S. embodying the result of his enquiry, he actually stated that he had detained some of the factory servants "only to keep up appearances,"* and he also admitted having committed, in the course of the enquiry, certain acts which were wholly illegal and unjustifiable.

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## XII.—THE MONGHYR CASE. (1879)

The facts of this case created much sensation in Bengal in the year 1879. A dispute had existed for some years regarding the possession of a piece of land which a wealthy mohunt† named Lachmi Das claimed as part of his property, while the Majholi Indigo Concern (of which Messrs. Crowdy and Holloway were Managers) claimed as appertaining to their estate. On the 22nd of November, 1878, the mohunt's people sowed the disputed land with wheat and *cheena*. Thereupon a servant of the Majholi Indigo Factory preferred a charge against some of the mohunt's servants and rayats of having, as members of an unlawful assembly, forcibly ploughed and sowed the land. The case was tried by Mr. H., an Assistant-Magistrate, exercising second-class powers, who discharged all the accused except one Jitoo Lall, whom he convicted of having been a member of an unlawful assembly, and sentenced to pay a fine of Rs. 200, or in default of payment to three months' imprisonment. Against this conviction and sentence Jitoo Lall appealed to Mr. M., the District Magistrate, the result of which appeal will be

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*Paragraph 65 of the Report.

†*Mohunt*—The head or abbot of a monastery.

mentioned hereafter. In his judgment convicting Jitoo Lall, the Assistant-Magistrate, Mr. H., remarked :—

"Inasmuch as no criminal force was used on this occasion (although there was a show of criminal force, if necessary), I cannot act under section 534 Criminal Procedure Code (Act X. of 1872), and restore Mr. Crowdy to possession."

The section referred to was the only provision of law under which, if criminal force had been actually used, a magistrate had any right to restore possession, and Mr. H. clearly saw that he had no power whatever under the circumstances of the case to put the factory in possession of the disputed land. Nevertheless, he proceeded to do, in his so-called executive capacity, what was manifestly illegal, and what he himself was unable to do in his judicial capacity. He issued a private order to the effect that Mr. Crowdy should be put in possession of the land. This order of Mr. H. being wholly without jurisdiction, was resisted successfully by the mohunt's people, who declined to give up possession of the land. Mr. M., the District Magistrate, on hearing of the resistance on the part of the mohunt's people, himself proceeded to carry out this illegal order of his subordinate. He arrived at the factory on the 23rd January, 1879, and while dining with Mr. Holloway, Manager of the factory, that evening, arranged with him to go on the following morning and take forcible possession of the disputed land, of which the mohunt had admittedly been in possession for two months. Next morning Mr. M. went to the spot, accompanied by a number of constables, armed with muskets and bayonets, and Mr. Holloway with some 40 ploughs, to plough down the wheat and *cheena* which had been growing upon the land since the 22nd November. On arrival, the Magistrate found the mohunt's people in large numbers on the ground, some of whom were armed with sticks, and, though they showed (according to the Sessions Judge, who afterwards tried the case) "extreme desire not to commit themselves and to abstain scrupulously from any illegal act," several of them were arrested by Mr. M. and taken prisoners. Immediately afterwards on the same day, Mr. M., without any complaint and without any evidence, issued a warrant for the arrest of Mohunt Lachmi Das himself, who lived many miles away from the spot, on charges under section 154 and 155 of the Penal Code, and, although offences under those sections are punishable with fine only, and are bailable, Mr. M. expressly directed in writing that the mohunt should not be released on bail. The mohunt was accordingly arrested on the 25th January, brought in to Monghyr as a prisoner, and kept in

the Monghyr Jail for 20 days without having been once brought before a Magistrate, Mr. M. persistently refusing his applications to be released on bail. On the 14th February, Mr. M. himself proceeded to prosecute the mohunt and all his men in the Court of Mr. S., the Joint-Magistrate, who was subordinate to Mr. M., and, though the admitted facts of the case disclosed no sort of offence against the mohunt or his men, Mr. S. had not the independence to discharge them, but committed them on various charges to take their trial in the Court of Session, which Court ultimately held that neither the mohunt nor the men had been guilty of any offence whatsoever, and acquitted them all on the 7th April, after they (the mohunt's men) had been in custody for more than two months. It ought to be stated that Mr. M. had in the meantime caused the crops of these men on the disputed land to be destroyed. As regards the action of Mr. H., who tried to cancell in his executive capacity, his own judicial order, the Sessions Judge (Mr. Lowis) in his judgment, remarked :—

Mr. H. admits in his evidence that since January 3rd (the date of his judicial order) he has taken no evidence as to possession ; that he has passed no subsequent judicial order on the subject ; and that his directions to the Police to uphold the factory in disturbing the possession of the mohunt's people were executive orders practically cancelling the judicial finding refusing to restore possession to the factory."

Regarding the case itself against the mohunt and his people, the Sessions Judge made the following observations :—

"The night before he (Mr. M.) arranged with Mr. Holloway, the assistant of the factory, to meet him next morning and point out the land. He went to the spot accordingly, when the factory were ready with some 40 ploughs to plough up the crops which had been growing there, as he himself computed, for two months previously. Having got there, he says, he explained to the people that they must allow the order of the Assistant Magistrate to be carried out. The crowd, originally about 200, increased, as he says, to over 1,000, and insisted that the land should not be given up. He then says he arrested some 14 persons, when, seeing that the people would not go, and that Mr. Holloway's ploughs had been driven away towards the factory, he proceeded to leave the ground. He then goes on to describe the rescue of the prisoners. From the above it is quite clear that from first to last what the Magistrate was trying to do was to restore possession to the factory. This, it is almost needless to point out, he had no right

to do. Possession was with the mohunt's people; no judicial enquiry had been made under Chapter XL., and no criminal authority has, except under this chapter, any jurisdiction to interfere with actual possession of immovable property. * * * * * *

"The prosecution may urge, why did not the parties appeal to the authorities? But, in the first place, the party in possession was being assailed, and had been assailed ever since January 7th, by the local criminal authorities acting executively, and it was difficult for them to know where to apply for help; not only so, but their failure to apply for the protection of the authorities, had such protection been available, would only deprive them of the plea of self-defence, and it would be unnecessary to consider that or any other plea in their defence until a case under section 141 has been made out against them by the prosecution. No such case has been made out. The assembly had not for its common object the over-awing a public servant in the exercise of the lawful power of such a public servant, nor was the common object the enforcing of a right, the only item of clause 4 which could in any way apply; the crowd, therefore, up to the time the prisoners were rescued, was not an unlawful assembly."

The above narrative of facts is based, as indeed the judgment of the Sessions Judge itself was based, upon the deposition of Mr. M. himself given in the Sessions Court. As regards his refusal to release the mohunt Mr. M. said in his deposition:—

"I directed that no bail should be taken. I knew that the offences under sections 145 and 155 were bailable. From the date of his apprehension, January 25th, up to 13th February, he was not, so far as I know, brought up before any Magistrate, but his Mukhtear came to me and applied for bail, which was refused on the ground that there would be another riot."

According to the finding of the Sessions Judge himself it was clear that if any person was guilty of rioting it was Mr. M. himself, but he probably thought he was justified in acting in his executive capacity in the way he did!

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## JITOO LAL'S APPEAL.

On the 30th of January, 1879, a few days after Mr. M. had accompanied Mr. Holloway, and attempted to put him by force in possession of the land, Mr. M., while out on tour 30 miles away from Monghyr, and without giving any notice to the appellant of either the time or place of

hearing, took up the appeal of Jitoo Lal, and not only dismissed it but enhanced the sentence originally passed by Mr. H., from a fine of Rs. 200 to six months' rigorous imprisonment! Jitoo Lal thereupon moved the High Court, and that Court on 9th May, 1879, quashed Mr. M.'s order, on the ground that the appeal had never been heard. The High Court proposed that the appeal should be sent down to the then Magistrate of Monghyr, as Mr. M. had in the meantime taken furlough, but Jitoo Lal's Counsel stated that, although the original conviction by Mr. H. was in his opinion unsustainable on the merits, yet his instructions were not to press for the hearing of the appeal, unless the High Court itself were inclined to hear it, and he accordingly pressed that the appeal might be transferred to the High Court. The learned Judges not having agreed to hear the appeal themselves, it was withdrawn simply because the appellant had no confidence in the Court of the District Magistrate! The High Court concluded its judgment in these terms :—

"We were prepared to send the appeal back to be heard by the present Magistrate of Monghyr, but Mr. Ghose (Counsel for the appellant) says he does not wish that course to be taken. The original conviction will therefore stand. We are bound to add that we have seen in this case indications of much irregularity and serious indiscretion on the part of the Magistrate. Having made this remark, we do not think it necessary now to say anything further."

In commenting upon this, the *Englishman* (16th May, 1879) remarked :—

"We feel bound to add, in the interests of public justice on which more than anything else the permanence of our Government in India depends, that the Judges of the High Court have shirked their duty, and under the veil of a half-hearted and indeed most gentle censure, have attempted to screen one of the grossest perversions of the criminal law that has ever come to our notice."

This "gross perversion of the law" would scarcely have been possible if Magistrates in India did not combine executive with judicial functions. It should be stated that an attempt was actually made by the local authorities to prefer an appeal through the Local Government against the judgment of the Sessions Judge acquitting the mohunt and his men, but the Legal Remembrancer declined to advise any such course in a letter which he addressed to the Commissioner of Bhagulpur, which was published in the *Statesman* of the 27th June, 1879, and which letter ended thus :—

"I do not attribute much blame to Mr. H; his only fault appears to

me to have been in striving to get rid of his own decision, and this sinks into insignificance when contrasted with some other orders that have been passed and carried out in the course of the proceedings.

"It is not my province to distribute praise or blame among any of the officers concerned, but I feel it my duty to point out to you that any attempt to make public these proceedings by appeal or otherwise must result in bringing discrebit, not only on the officers concerned, but probably on the service to which they belong. The record is herewith returned."

Commenting upon the withdrawal of the appeal of Jitoo Lal, the *Statesman* in a leading article (20th May, 1879) made the following remarks:—

"Jitoo Lal is unfortunately a representative man. There is throughout the Mofussil a deep feeling of dissatisfaction with our administration of justice, and this ought to be known and acknowledged, for it is fatal to true loyalty. There can be no advantage in blinking unpleasant facts, in trying to delude ourselves with the belief that the people have confidence in our administration of justice, and in making our countrymen at home believe that this is one of the great boons we have bestowed upon the people, for which they are truly thankful. The truth is not so. The people have the greatest confidence in our High Courts, and generally also, we think, in our Sessions Judges, but not in the justice administered by our Mofussil Magistrates."

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## XIII. THE KRISHNAGHUR STUDENTS' CASE. (1884).

At a *Barwari jatra* (a theatrical performance given by public subscription) held at Krishnagar on July 13th, 1884, a large crowd had assembled and a number of students were seated on benches constructed of bamboos. The managers of the *jatra* in order to make room for more visitors, suddenly cut down some of the benches on which the boys were seated; some of the boys, in consequence, fell down and the remainder began clapping their hands. The clapping continued for several minutes and the result was that the performance could not take place, and the audience were dismissed, the band playing the National Anthem. The District Superintendent of Police, Major R., who had some hand in organising the *jatra*, was very much annoyed at the performance not having taken place, and he directed his subordinate police to arrest the boys who, by their clapping, were instru-

mental in breaking up the *jatra*. He also caused one of the shopkeepers to become the formal complainant in the case, and a prosecution was accordingly instituted against several of the boys, who had been arrested in their lodgings, on a variety of charges. Major R. got the Magistrate of the District, Mr. T., to make over the case to an Assistant Magistrate, Mr. P. H. O. of the Bengal Civil Service, and prevented the case from being taken up in the ordinary course by any of the Bengali Magistrates in the town of Krishnagar. Twenty-five students were accordingly charged before the Assistant Magistrate on the 25th July; fifteen witnesses for the prosecution were examined in chief, the cross-examination being reserved. All that these witnesses proved was that these boys were among those who had, by clapping their hands, prevented the *jatra* from taking place. After a protracted trial and some adjournments the case resulted in the boys being aquitted on the 19th August on the ground that no offence had been disclosed.

The proceedings in this extraordinary case attracted the attention of the Lieutenant-Governor of Bengal—Sir Rivers Thompson,—who, in an elaborate Resolution, transferred and otherwise punished both the District Superintendent of Police, Major R., and his friend, Mr. T., the District Magistrate, with whom he was "hand-in-glove," an officer of many years' standing. The following extracts from the Government Resolution will be read with interest :—

"6. * * * It is surprising that a perusal of the papers should not have shown an officer of Mr. T.'s experience and standing that such a charge could never hold good, and if he had made the enquiries, which he ought to have made, into the circumstances of the case, and the manner in which the police investigation had been conducted, it is scarcely possible to believe that he would not have seen that the case should not be proceeded with. He has acknowledged in his evidence that he made no such enquiry. He further committed the very grave error of allowing Major R. to suggest to him that a particular officer should be selected to try the case. It is no defence or palliation of this indiscretion to assert as Mr. T. asserts, that other complainants have made similar applications to him ; because Major R. in his position of District Superintendent of Police, was not an ordinary complainant and the very least acquaintance with the circumstances of the case must have shewn that he was pressing this prosecution with an amount of eagerness and pertinacity which only some great State trial would have justified. The reasons, too, on which Major R. urged his application were unjustifiable ; and if Major R.'s extremely improper attempt to induce the

shop-keepers to press the case had come to his knowledge the Magistrate should have taken immediate and serious notice of it. He states that he knew nothing about the men being sent for. But one of the worst features in the whole case is that a prosecution, commenced without any legal justification, has been pressed forward in a peremptory and injudicious manner without any real control from the Magistrate of the district and practically at the will and dictation of the Superintendent of Police. The Lieutenant-Governor is certain that not in many districts of Bengal could such a perversion of authority have been tolerated, and, in his opinion, here it was clearly the duty of the Magistrate, to instruct the police to abandon the case, and if he considered it necessary to take any further notice of the turbulent conduct of the boys, he should have called the attention of the Education Department to the matter. It is quite clear from the communication addressed to the Director of Public Instruction by the Principal of the Krishnagar College, that the latter was prepared to deal in an adequate manner with any misconduct, not amounting to a criminal offence, of which the students might have been guilty.

"7. It is not necessary to dwell at length on the subsequent proceedings. The Lieutenant-Governor has read with surprise and regret the evidence of both Mr. T. and Major R. He observes that they urge that several of their recorded statements require explanation or correction, but they have not supplied this defect in their explanations. Mr. Rivers Thompson must express his strong reprobation of the endeavour made by Major R., in private conversation, to persuade the Assistant Magistrate to take his view of the legal aspects of the case, and the attempt made on the 15th August to obtain a conviction for nuisance under section 290 of the Penal Code, when it was clearly apparent the charge of unlawful assembly under section 143 Penal Code, would not stand, seems to have been injudicious and vexatious. The complaints now made by Mr. T. and Major R. of the inefficient way in which the prosecution was conducted are unintelligible. Major R. stated in his evidence that he considered himself *de-facto* prosecutor, and Mr. T. stated that he had discussed the case daily with Major R. as to its legal aspects; that he had suggested the sections and that he had instructed the Inspector who conducted the prosecution to press for a conviction. If therefore, the prosecution was mismanaged, these two officers must, on their own shewing, be held responsible for its defects. But the Lieutenant-Governor is unable to accept the suggestion that if the case had been differently conducted in Court the result would have been

different. It seems clear to him that if Mr. O. had more experience in judicial work, and if he had been an officer of greater standing, he would probably have seen his way to dispose of the case at a very early stage of the proceedings. He possibly made some mistakes in procedure, notably in not reading over to Mr. T. and Major R. the evidence given by them. But the decision come to by him was undoubtedly correct, and having regard to the official pressure exerted for a conviction, even if only with the idea of a nominal penalty, it is clear that the right result of the case does much credit to his impartiality and firmness.

"8. Upon the whole case the Lieutenant-Governor regrets to be constrained to record that he has never come across proceedings which betrayed a greater want of sense and judgment than those which he has now been obliged to criticise and condemn. The precaution of half an hour's temperate enquiry in the first instance must have satisfied the district authorities, not only that no penal offence had been committed, but that taking the occurrences in their most objectionable light, they exhibited a sudden outbreak on the part of a parcel of school-boys to express a not unreasonable dissatisfaction at the treatment they had received at the *jatra*. To magnify this into a criminal offence, to haul the culprits to the police lock-up, threaten them with a long detention under custody and to commence and carry on a prosecution against them in the court with the express view of causing harassment and annoyance, are acts which are as unjustifiable as they are discreditable to the administration. This want of judgment and discretion on the part both of Mr. T. and Major R. is aggravated by the fact that overtures for conciliation on what appear to the Lieutenant-Governor to be very reasonable terms, offered by the Counsel for the defence, were summarily rejected; and that among the reasons assigned by Mr. T. for pressing for a conviction under the Penal Code are the extraordinary ones that there had been "obstruction, threats, newspaper writings and subscription from outsiders," and that he wished to court an enquiry into the good faith of himself and the District Superintendent. Mr. Rivers Thompson finds it difficult to understand how officers in their position could have allowed themselves to be influenced in pushing forward a criminal prosecution by considerations such as these, and he would have rejected the imputation of these motives as incredible, if based on evidence less convincing than the admissions made in Court and in the explanations now received. It is not by a mere expression of censure that the Lieutenant-Governor can meet such a case and his sentence must be that Mr. T. should be degraded to the

second grade of Magistrates for six months, and that Major R., now in the second grade, should be reduced to third grade of District Superintendents of Police, and be debarred from promotion for one year. Both officers will be transferred from a district in which, by these recent proceedings, they must have lost all influence for good. It is with extreme regret that the Lieutenant-Governor finds himself obliged to come to this decision, because he is not unaware of the good services which Major R. has rendered in the Police Department."

The disclosures made by Major R. and by Mr. T. will no doubt seem startling to those who are accustomed to the procedure of courts of justice in England, but they are nothing new to those who are conversant with the manner in which criminal justice is administered in India under the present system, combining executive and judicial power in one and the same Magistrate. The District Magistrate is generally "hand-in-glove" with the District Superintendent of Police and all subordinate magistrates cannot but be under the direct influence of the District Magistrate who guides and shapes their opinions in all judicial matters. The trying magistrate Mr. O. found himself in a most difficult position : he could not help being under the influence of his official superior, and although he ultimately did justice in the case he did not do so without considerable hesitation and reluctance.*

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## XIV.—THE RUNGPORE DEER CASE. (1886)

In the district of Rungpore, Babu Annada Prasad Sen possessed considerable landed properties, and lived in the same house with his paternal aunt, Prasannamayi Dasi. For three years prior to 1886, he had a tame deer of the species known as swamp deer, which was first brought when very young and always believed to be quite harmless. The deer used to be kept within a bamboo enclosure six feet high and a servant was specially appointed to look after and attend to it. On the morning of the 6th September at about 7 o'clock, Mr. S——h, who was Assistant-Superintendent of Police at Rungpore, was informed by a man named Ainuddin, who had been in the service of a gentleman who was staying with Mr. S——h, that the deer had got loose. Mr. S——h thereupon took his rifle and went to the house of the zemindar, Annada Prasad Sen, and found that the zemindar was not then in the district. According to the evidence of the men present in the house, Mr. S——h

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*The full report of the proceedings of this case appeared in the *Statesman* newspaper of the time and was re-published in Mr. Manomohan Ghose's original pamphlet. Ed

sent for the zemindar's Dewan, Pyari Mohun Bose, and told him that his master had twice deceived him : (once he had refused to lend his elephant after having promised to do so, and on another occasion had insulted him in connexion with a procession). and said that he would see the zemindar punished. While Mr. S——h was speaking to the Dewan, the servants of the house were trying to drive the deer into the enclosure, but did not succeed in doing so. Thereupon Mr. S——h shot the animal dead within a few yards from where he was standing. A pleader of the High Court who happened to come to the house was instructed immediately by the Dewan to inform Mr. S——h that he had needlessly shot the deer, and that proceedings would be instituted against him on behalf of the zemindar for his having done so. Immediately afterwards the Dewan sent the dead animal in charge of some servants to Mr. N., the District Magistrate, in order that he might have an opportunity of seeing that it had no horns, and that he might also be informed of what had been done by the Assistant-Superintendent of Police. Mr. N., instead of listening to the complaint, got enraged at the sight of the deer, ordered the carcase to be removed instantly from his house, and declined to listen to any complaint against the Assistant-Superintendent of Police. Latter in the day Mr. S——h sent for Ainuddin and insisted upon his preferring a complaint at the Police Station against the Dewan, Pyari Mohun Bose, and this man accordingly, at 2 p.m. on the same day. under orders from Mr. S——h, preferred a charge under section 289 of the Penal Code for the offence of neglecting to take care of a dangerous animal in his possession. Mr. S—h having secured the support of the District Superintendent of Police, Mr. S., and of the District Magistrate, Mr. N., caused his subordinate police officers to send up the charge as a true one to the court of Babu Chandi Charan Bose, a Deputy Magistrate. The case against the Dewan was accordingly heard on the 8th and 9th September. and all the witnesses cited by the police were duly examined. Mr. S—h volunteered to give evidence as an important witness, but was not fully or properly cross-examined by the accused, the Deputy Magistrate having intimated that such cross-examination was unnecessary as no case had been established on behalf of the prosecution. The result of the trial was that the Dewan, Pyari Mohun Bose, was acquitted without being called upon for his defence, but unfortunately the Deputy Magistrate expressed no opinion upon the question as to whether the evidence adduced by the police regarding the vicious propensities of the animal was true or false. This decision of the Deputy Magistrate, however, was very distasteful

to Mr. S—h who, after a private consultation with the District Superintendent of Police, and the District Magistrate, decided to prosecute the aunt of Babu Annada Prasad Sen, the zemindar, as she was, in the zemindar's absence, the head of the family. The Sub-Inspector of Police was sent up as a formal complainant, and he applied on the 15th September, 1886, for a summons against the lady. The Deputy Magistrate at first was reluctant to issue any summons, but instead of taking upon himself the responsibility of refusing the summons, thought it safer for himself privately to consult Mr. N., the District Magistrate, under whose advice, five days after, the Deputy Magistrate decided to summon the lady to answer a charge under section 289. The case accordingly came on for hearing before the same Deputy Magistrate on the 14th October, when counsel from Calcutta was engaged at considerable expense to defend the lady. What happened at the commencement of this trial will be found in the following report as taken from the *Statesman* newspaper of 19th October, 1886 : –

On the Magistrate taking his seat, Mr. GHOSE, addressing his worship, said : I appear, Sir, on behalf of the lady, Prasannamayi Dasi, and before the case is proceeded with, I believe you will agree with me in thinking that it is but fair to the accused that she should know the circumstances under which the prosecution against her originated, as there is nothing disclosed at present on the record. I have been informed, Sir—and you will correct me if my information is wrong—that after the case against Pyari Mohun Bose had concluded, that is, after he had been acquitted, an application was made to you for a summons against the lady ; that you at first disapproved of the proceeding and recorded your disapproval, but that afterwards, after a lapse of five days, you granted the application. I should, therefore, like to know, Sir, if what I state is correct, under what circumstances the summons was subsequently ordered to issue against the lady, and whether anything transpired in the interval to induce you to change your mind.

The MAGISTRATE : Yes, first let me take evidence in the case, and I shall then let you know the circumstances under which I granted the application.

Mr. GHOSE : But surely, Sir, that would be at a very late stage. I see that a letter or petition was presented to you on the 16th September, and that it was not till the 21st September that you were pleased to direct a summons to issue against my client. What I would like to know is, why there was this delay in granting the application, and the circumstances which led to the issue of the summons, as it is

very important that I should know them at the beginning.

The MAGISTRATE: I can only say this, that I consulted the Magistrate—there is no harm in my taking his opinion—whether it would be proper for me to summon Prassannamayi, and in accordance with that opinion I issued summons.

Mr GHOSE: Then am I rightly informed, Sir, that when the application was first presented to you, you declined to issue the summons, but that you granted it at the suggestion of the Magistrate?

The MAGISTRATE: What passed between me and the Magistrate is private, and I don't think you have any right to know it.

Mr. GHOSE: There can be nothing private in a judicial proceeding. I am entitled to know who my prosecutor is, as the law requires that the complainant should be examined, and no complainant has yet been examined.

The MAGISTRATE (pointing to the witness Ainuddin): He is the complainant.

Mr. GHOSE: No, Sir, he is not, and has never been the complainant. He never preferred any charge against the lady before the police at any time. The application against the lady was made by Kasi Mohun Sen, Court Sub-Inspector, and as he applied for the summons I should like to begin by examining him, he being the complainant.

The MAGISTRATE directed Kasi Mohun Sen to be called, but was informed that Kasi Mohun had taken a week's leave and left Rungpore.

Mr. GHOSE: This is extraordinary, especially as the first thing to be done is to find out who is the prosecutor, and to examine him.

The MAGISTRATE: You can ask the District Superintendent who appears as Prosecutor.

Babu NIL KAMAL BANERJEE (another Court Sub-Inspector) said he was instructed to appear as prosecutor.

Mr. GHOSE: He is not the complainant.

The MAGISTRATE: He may appear as public prosecutor.

Mr. GHOSE: I have a right in law to examine this man Kasi Mohun Sen, on whose written complaint process has been issued. As you know, Sir, a magistrate can take cognisance of a case only in one of three ways:—1. On a complaint. 2. On a police report, as defined by the Code. 3. On suspicion or personal knowledge. So far as I can see, this case originated on a complaint, there being no A form or police report against the lady. Kasi Mohun Sen is the complainant, and he is not here.

The MAGISTRATE: He is a complainant in his public capacity.

Mr. GHOSE : There is no such thing as complainant in a public capacity. He is either the complainant or he is not.

The MAGISTRATE : But his letter may be called a police report.

Mr. GHOSE : There is no police report, but a letter, or petition, or whatever else it might be called, upon which the sanction for summons was given. It is, as I am sure you will allow, Sir, of the utmost importance to me that I should know who my prosecutor is. I see in the original list of witnesses sent by the police that Mr. S—h's name is mentioned. He was considered a very important witness in the case against Pyari Mohun Bose, and was examined on that occasion. I should like to know if he will be examined to-day in this case.

The MAGISTRATE : His name appears in form A. (To the Court Inspector). Are you going to examine Mr. S—h ? You ought to be able to say so at once.

Babu NIL KAMAL BANERJEE : I am not acquainted with the facts of the case, and leave the matter to the Court.

The MAGISTRATE : Kasi Mohun Sen, the Court Sub-Inspector, who applied for the summons in this case, is not here.

Mr. GHOSE : Whoever is pulling the strings should, in justice to all concerned, appear and take the responsibility of the prosecution. The law says the complainant should be examined. Ainuddin, the complainant in the other case before the police, never mentioned the name of this lady, and, as the summons in this case was issued on application of Kasi Mohun Sen, I should like to examine him, but, as you see, Sir, he does not appear.

The MAGISTRATE : This is a police prosecution, and the police have brought these men (reads list of witnesses).

Mr. GHOSE : You issued the summons, Sir, not on any police report, for there is none, but on a letter or petition of Kasi Mohun Sen. However, I do not object to the witness Ainuddin being examined now, but the person on whose petition action was taken, must also be examined. If, however, Mr. S—h is going to be examined, I will show that he is the real complainant, and I shall be glad to give up Kasi Mohun. The sooner it is understood that a criminal prosecution of this sort is a serious matter, and should not be lightly undertaken, the better for all concerned. I confess I am not a little surprised at the hesitation displayed to call Mr. S—h, the person who killed the deer, and who is the prime mover in this case.

The MAGISTRATE (to his clerk) : Let me see the list of witnesses, and see how many persons they are going to call.

(The Magistrate here entered into a short conversation with Babu Nil Kamal Banerjee, who afterwards went out to consult Mr. S—h for several minutes).

Mr. GHOSE : We are losing very valuable time, Sir. The police should have known what course they intended to adopt. This is scarcely the time for consultation.

Babu Nil Kamal Banerjee, Inspector, on his return, intimated that it had been decided not to call Mr. S—h as a witness, and handed to the Court a fresh list of witnesses.

The Magistrate then read out the names of the witnesses.

Mr. GHOSE : Then I understand, Sir, that Mr. S—h, who represents the police, who killed the deer, and who was a most important witness in the case against Pyari Mohun Bose, does not venture to come forward in this prosecution.

The MAGISTRATE : His name is not in the list of witnesses now handed to me.

Mr. GHOSE : Then, Sir, it will be my duty to present to you certain petitions. As I am anxious, on behalf of my client, that this case should be disposed of at once, and as Mr. N., the District Magistrate, will, I hear, be leaving the station to-day, the first petition I have to present is this :—

To the Deputy Magistrate of Rungpore.

The humble petition of Srimati Prasannamayi Dasi of Rungpore.

Humbly Showeth—

(1.) That your petitioner is at present being prosecuted under section 289 of the Indian Penal Code, on a complaint ostensibly brought by one Kasi Mohun Sen, Court Sub-Inspector.

(2.) That your petitioner submits that the prosecution is not only without any reasonable and probable cause, bnt absolutely malicious and *mala-fide*.

(3.) That in order to substantiate the defence of your petitioner, it would be most material to examine Mr. J. H. N—., the District Magistrate of Rungpore, who your petitioner is advised and believes, will be able to give very material evidence bearing upon the circumstances which have led to the prosecution.

(4.) That as the said Mr. N. is at Rungpore to-day, but is about to leave the station, and as your petitioner cannot without summons

secure his attendance she prays that he be requested or summoned to appear in Court, and give evidence in Court to-day, and, further, that he be called upon to produce the following documents in Court :—

(a) All letters, correspondence, proceedings, reports, and memoranda which have passed between the said Mr. N. and your worship (written by either) regarding the case of Ainuddin *vs.* Pyari Mohun Bose, or this case, between the 6th September and the 21st September, both dates inclusive.

Your petitioner is willing to deposit at once any amount which the Court considers reasonable for the attendance of the said Mr. N.

And your petitioner as in duty bound shall ever pray.

Kallidhan Mookerjee, *Vakil.*

*Dated* Rungpore, *14th October, 1886.*

Mr. GHOSE (continuing): This, I may say, I shall only ask for, if you think that a sufficient case has been made out against me to put me on my defence. The second petition which I have to present is to the following effect :—

To the Deputy Magistrate of Rungpore.

The humble petition of Srimati Prasannamayi Dasi of Rungpore.

Humbly Showeth—

That in the case under section 289, Indian Penal Code, in which your petitioner is at present being prosecuted, Mr. E. A. S—h is a very important witness for the prosecution, and as such he was examined in this Court in the case against Pyari Mohun Bose.

No reason has been assigned why Mr. S—h who killed the deer, has not been cited by the prosecution : and as it is very important for your petitioner to show that the present prosecution is malicious and *mala fide*, and as Mr. S—'s evidence would be very important on this point, your petitioner prays that he be summoned to give his evidence in Court to-day, your petitioner being prepared to deposit any amount which the Court thinks reasonable for his attendance.

And your petitioner as in duty bound, etc.

Mr. GHOSE : I am informed that Mr. S—h is within the precincts of this building.

The MAGISTRATE : Yes, let the witnesses for ths prosecution be first examined, then I will consider about Mr. S—h.

Mr. GHOSE : I say, Sir, that Mr. S—h is a most important witness in this case. He was the person who killed the deer (laughter) ; he was the Police officer most concerned in the case, and was examined by

you in the case against Pyari Mohun. If he is animated by proper motives, how is it that though he came forward as a witness in the last case, he now refuses—that is the interpretation I am reluctantly forced to put upon his conduct—to come into the witness-box.

The MAGISTRATE : With regard to Mr. N., I may tell you that he will be going away on leave to-day.

Mr. GHOSE : It may be that after examining Mr. S—h and getting the answers which I expect to get from him, it will not be necessary for me to examine Mr. N.

The MAGISTRATE : Yes, you may depend that Mr. S—h will be summoned, and on the understanding that he will be examined later, we may proceed with the examination of other witnesses.

An immediate summons was then ordered to be served on Mr. S—h, Mr. Ghose undertaking to inform the Court in time should he require Mr N.

The trial then proceeded and the witnesses were examined and cross-examined, and it was shown clearly that the whole prosecution had its origin in Mr. S—h who was the real prosecutor behind the scenes. As soon as the witnesses were cross-examined and the statement of the lady who was allowed to appear through Counsel, was taken, her Counsel applied that Mr. S—h should be the first witness called for the defence, especially as the defence had produced certain letters from Mr. S—h to the Zemindar, showing that the latter had incurred Mr. S—h's displeasure by his refusal to lend his elephant. The Magistrate thereupon said :"There is no necessity for you to go into the defence. I acquit Prasannamayi Dasi." The lady was put to very great expense by reason of this prosecution and after the publication of the proceedings in the newspapers of Calcutta, the Lieutenant-Governor of Bengal (Sir Rivers Thompson) reviewed the case in a Resolution dated 1st March, 1887, from which the following extracts are taken :—

"..... It is no doubt possible that Mr. S—h originally went to the spot and with a rifle, in consequence of the exaggerated account given to him by his informants. But his proceedings after his dispute with the Dewan were entirely uncalled for, and it is quite clear that he should have retired from the scene when he found that the reports regarding the animal were extravagantly wide of the truth, and that the servants of the Babu were in a position to secure it.

(5) The proceedings in the next stage were more serious. It appears that Mr. S—h at once reported the circumstances to his superior officer, the District Superintendent, Mr. S., and that the result

of their conference was that Mr. S—h sent a constable for the man Ainuddin who had originally reported to him that the deer was doing mischief and told him that, as injury had been done to him he should complain. Without such instigation, there is no reason to suppose that the man would have moved in the matter. Thereupon, Ainuddin laid a charge at the Police Station against the Dewan, Pyari Mohun Basu, and the police sent the case up for trial. It appears that the matter also came to the notice of Mr. N., the Magistrate and Collector of the District, and that he was cognisant of these proceedings and approved of the action of the District and Assistant Superintendents. The question for the Lieutenant-Governor to consider is whether Mr. S. and Mr. S—h acted in good faith, in causing this prosecution to be instituted. They both argue that the fact that some people went to Mr. S—h and asked him to take measures to have an animal which was loose and doing mischief tied up constituted the laying of a charge under section 289 of the Indian Penal Code before a Police Officer, and that the Police were bound to proceed with the charge. This explanation does little credit to those by whom it is advanced. All the proceedings show that the prosecution was a police prosecution, and the police authorities should not have put forward a complaint or to endeavour to invest it with any other appearance. Mr. S—h himself in his evidence on oath said: "I then told the Dewan that I should prosecute him for not taking proper care of a savage animal in his charge." But it is quite evident that the circumstances did not justify a police prosecution. The animal was not shown to have been dangerous, and the events of the night on which it got loose were not sufficient to make its owner or keeper criminally liable because it succeeded in escaping from its enclosure. Moreover the animal was then dead, and Ainuddin or any of the other persons who had been frightened should certainly have been left to their own remedy. Looking to all the circumstances, the Lieutenant-Governor must hold that Mr. S. and Mr. S—h were actuated by other motives than those of public duty in proceeding with the case. Whether these motives were on Mr. S—h's part, irritation at the action or words of Babu Annada Prasad Sen or his adherents, or at the the threat of a civil action, or, on Mr. S.'s part, a desire to support his subordinate, cannot be determined. But that a police prosecution was instituted for some other objects than the prosecution of the public interests, is the only inference to be drawn from the facts. Mr. N. appears at least passively to have acquiesced in this abuse of official power.

(6) In the course of the trial before the Deputy Magistrate, Babu Chandi Churn Bose, no proof was adduced of habitual fierceness or dangerous character of the deer. The complainant stated generally that it was in the habit of injuring people, but no witness supported this statement and one directly denied it. The Dewan admitted that on one occasion when its keeper had put his arms round the animal's neck it had shaken him off, and in doing so hurt him with its horns, and that its horns had been cut down in consequence. The statement was supported by the production of the animal's head in Court. This fact itself showed that measures had been taken to prevent the animal from doing harm. At any rate the case for the prosecution entirely failed. Yet, the Deputy Magistrate instead of directly finding this, dismissed the case on the ground that the Dewan was not the person in charge of the deer. This error of judgment laid the basis for the unfortunate proceedings which followed.

(7) On its coming to Mr. S.'s knowledge that the case had been dismissed on this ground, he directed the Court Sub-Inspector to apply for a summons against Babu Annada Prasad Sen's aunt Srimati Prasannamayi. This was a serious aggravation of the previous impropriety of pressing the prosecution at all, and it brings into strong relief the action of Messrs. S. and S—h in instigating Ainuddin to lay his formal complaint in the instance. It indicates a reckless determination to cause trouble and annoyance to those against whom the police had once directed their exertions. The Deputy Magistrate instead of peremptorily refusing to issue summons referred the case to Mr. N., giving his reasons for thinking that a summons should not be issued. Thereupon Mr. N. recorded the foolish order sanctioning the issue of summons. It is probable, as you observe, that he never looked at the record, but in any case it is clear that he absolutely failed in his duty as chief controlling authority and executive head of the district. The deer, which was the cause of the offence, was dead; the first prosecution had failed, and an officer in his position with any claim to judgment, would have been glad of the opportunity of staying further proceedings. That he should encourage the continuance of the scandal by allowing action to be taken against a lady, and thus, instead of suppressing it, giving it the sanction and support of his authority makes it manifest that he was wanting in ordinary discretion.

(8) The second prosecution, as might have been expected, failed like the first. One incident occurred, however, in the course of it, which gave Messrs. S. and S—h a further opportunity of showing their inability

to realise their responsibility to the public and to the Government. Mr. S—h, who had appeared as a witness for the prosecution in the first case, was not put forward as a witness in the second. The reasons given for this are, as you have shown, quite futile, Mr. S—h was cited as a witness for the defence, and it was then made evident that the counsel for the defence wished to have an opportuity of examining him. When it was found that the case would be dismissed without any witness for the defence being called, an attempt was made to induce Mr. S. to allow him to appear as a witness for the prosecution, in order that he might be cross-examined. Mr. S. refused to do so, and the Deputy Magistrate did not exercise his power of calling him as a witness, and Mr. S—h did not offer himself. Mr. S.'s explanation on this as on other points, show an inability to realise the position of a police officer in the matter. It was not a matter of "the fighting out of personal issues between Mr. S—h and Babu Manomohan Ghose." It was a matter of clearing Mr. S—h, and through him Mr. S. himself, of *animus* in instituting or promoting the prosecution. If no such *animus* existed, the police officers should have been ready to take the opportunity of disproving it. That they declined the opportunity affords the strongest ground for assuming that they feared the result of the ordeal. Without rejecting Mr. S—h's statement as regards the altercation between him and the Babu's adherents, the Lieutenant-Governor must hold that there was something in those proceedings, or in the antecedent or subsequent proceedings, which he was unwilling to subject to public scrutiny.

(9) The whole case exhibits a course of arbitrary and oppressive action on the part of Messrs. S—h, S. and N., which the Government cannot tolerate. Such proceedings can only bring the administration into contempt and disrepute, and enhance the difficulties of officers who are really anxious to administer their charges with fairness. Babu Chandi Churn Bose displayed a want of judicial accuracy in the first case and of judicial firmness in the second ; but beyond this, his conduct does not call for unfavourable comment. Mr. S—h has already been transferred to the Chittagong Hill Tracts. He is an officer of only a year's standing and was acting in a greater part of these proceedings in a subordinate position. He is a 3rd grade Assistant Superintendent officiating in the 2nd grade. He will be deprived of his officiating promotion for six months, and the Commissioner of Chittagong in communicating to him an expression of the strong displeasure of Government, will inform him that his restoration to promotion will be dependent on the nature of the reports received from his departmental supe-

riors. Mr. S. has already been deprived of his officiating charge as District Superintendent and transferred to another District in the capacity of Assistant Superintendent. The Inspector-General will convey to him the severe censure of Government, and inform him that he will not be appointed to the charge of a district for at least one year, and until he is reported to have shown a better appreciation of his duty and responsibilities. Mr. N. has applied to resign the service, but having regard to the part he took in the case, and considering that it was to him as the chief officer of the District that Government had to look for the repression of the irregularities of his subordinates, the Lieutenant-Governor is constrained to mark his dissatisfaction by directing that from the 1st March, Mr. N. should be reduced to the 2nd grade of Magistrates and Collectors."

It will be seen that the Deputy Magistrate was compelled to issue a summons in the case in order to please his official superior Mr. N., the District Magistrate, whose conduct in the case is so severely censured by the Lieutenant-Governor. Had the Deputy Magistrate been left free to exercise his own judgment such a scandal as this would never have taken place. But the Bengal Civil Service, according to its leading organ the *Pioneer*, considered that Mr. N. was very severely dealt with by the Lieutenant-Governor, and that paper remarked that nine out of ten members of the Civil Service would consider themselves "very harshly treated" if they were called to account in the same way for doing what Mr. N. had done!

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## XV.—THE JAMALPUR MELA CASE. (1887)

Jamalpur is a sub-divisional town in the district of Maimansingh. In 1883 Mr. Nanda Krishna Bose was in magisterial charge (executive and judicial) of the sub-division of Jamalpur, and in that year a public meeting of the inhabitants of the place was held in which it was resolved that a *Méla* (exhibition or fair) should be held, annually in the town for the encouragement of trade and agriculture, and that it should begin in February or March and last for about a month and a half, and that the expenses should be defrayed by public subscription. The first *Méla* or exhibition was held, after raising the necessary funds, on a piece of land belonging to the Government called Line Jamalpur, which was placed at the disposal of the *Méla* Committee by the Sub-Divisional Officer, with the consent of Mr. R. M. Waller, then Magistrate and Collector of Maimansingh. The *Méla* continued to be held similarly in 1884 and 1885, the

surplus proceeds from the public subscription and the profits being deposited in the Postal Savings Bank, in the name of the President of the Committee, who during those years was Mr. Nanda Krishna Bose. Early in 1886 he was transferred from Jamalpur, and was succeeded by Babu S. C. D., a Deputy Magistrate, who, shortly after his arrival, was elected as Chairman of the *Méla* Committee, and the exhibition for 1886 was held as before. About April, 1886, certain letters passed between Babu S. C. D. and his official superior Mr. G., then Magistrate and Collector of Maimansingh, as to the desirability of making over the *Méla* and its funds to the Government. The members of the *Méla* Committee apparently disapproved of this suggestion to deprive the public of the management of the *Méla*, and represented the matter by letter to Mr. Nanda Krishna Bose, the founder, who was then in another district. Mr. Nanda Krishna Bose's reply was to this effect: "You should remember that the *Méla* is a public institution, and not Government property. There is a committee of management, and you have every right to protest against the diversion of the funds to Government." It had been customary, on the opening of the *Méla* every year, for the Hindus to worship an image of the goddess Kali, which used to be kept in a thatched house within the *Méla* grounds. In November, 1886, Mr. G., Magistrate of the District, visited Jamalpur and directed his subordinate Babu S. C. D., by an order in writing, that the image of the goddess Kali should be removed from the *Méla* ground within six hours, and the goddess was accordingly thrown away by coolies—a proceeding which naturally gave offence to the Hindu community. On the 28th November, 1886, the inhabitants of Jamalpur held a public meeting and resolved that a general meeting should be convened at an early date for the purpose of making arrangements for the *Méla* of the following year, and for the purpose of obtaining from the Government a lease of the *Méla* ground. A letter was accordingly addressed by the chairman of the meeting to Babu S. C. D., containing the substance of the resolution, to which Babu S. C. D. replied that he would convene a meeting, as requested, at an early date. Instead of doing so, however, Babu S. C. D., without consulting the committee, began making arrangement for holding the *Méla* independently of the committee, whereupon another public meeting of the inhabitants was held on the 19th December, at which it was resolved that a letter be addressed to Babu S. C. D. requesting him to desist from spending the money of the *Mela* fund and from disposing of the furniture and other movable property belonging to the committee without their sanction. This resolution was also duly commu-

nicated to Babu S. C. D. On the 25th December, 1886, a further meeting of the *Méla* Committee was held, at which it was resolved that Babu S. C. D., having failed to convene a public meeting, and by reason of his time being almost entirely taken up by official duties, a non-official and Honorary Magistrate should be appointed President of the *Méla* committee, and that he should take over all the properties belonging to the *Méla* from Babu S. C. D. It was further resolved that, inasmuch as Mr. G., the Magistrate and Collector, was opposed to any religious worship or amusement of any kind being held on Government land, it would be desirable to hold the *Méla* on some other site not belonging to the Government. The substance of this resolution having been communicated to Babu S. C. D. by the newly elected President, Babu S. C. D., by way of reply, forwarded a copy of the following letter from the Magistrate and Collector :—

To the Sub-Divisional Officer, Jamalpur.

Your No. 193, dated 28th December, 1886. You will make nothing over to anyone else ; the regulation of the *Méla* is to remain in your hands as Sub-Divisional Officer, assisted by the Committee.

*1st January, 1887.* (Sd.) E. G., *Magistrate and Collector.*

A general meeting of the inhabitants of Jamalpur was again held in February, 1887, and it whs resolved by those present that in consideration of the approaching Jubilee of her Majesty the Queen-Empress the *Méla* should be opened on the 16th February, the date fixed for the celebration of the Jubilee, and that out of the proceeds of the *Méla* a school should be established, to be called the Jubilee Vernacular School. In accordance with this resolution a public subscription was raised by the Committee, and it was annonnced that the *Méla* would be opened on this occasion at a place called Khatiakury, in Jamalpur, on the 16th February. Traders and shopkeepers accordingly commenced to arrive from the interior from about the 10th February, 1887, with various kinds of goods, and to occupy stalls which had been built for them by the Committee. On the 14th February, Babu S. C. D., who expected to be supported by the District Magistrate, accompanied by a Sub-Inspector of Police and about twenty constables and eight or ten chaukidaris or rural watchmen, suddenly appeared without any complaint or information of any kind on the *Méla* ground, and ordered the police to examine the weights of the shopkeepers. Whereupon several persons apprehending ill-treatment ran away ; three of them who stayed there were arrested by the Police, bnt subsequently released

and their weights taken from them. Babu S. C. D. intimated that orders would be passed regarding them hereafter. On the 15th February several police constables again came to the *Méla* ground and commenced to dissuade the shopkeepers and others from attending the *Méla*. About that time Babu S. C. D. further instituted proceedings against several of the supporters of the *Méla* for the purpose of binding them down to keep the peace, but afterwards took no further steps in the matter.

The *Méla*, in spite of the opposition of the Magistrates and the Police, was however opened on the 16th February as announced, and about the same time Babu S. C. D. himself gave out that he would open another *Méla* at Line Jamalpur, on 9th March. The Police during this period were instrumental in harassing the supporters of the public *Méla* opened on the 16th February, in various ways, and certain complaints of ill-treatment and wrongful confinement were brought against the Police by some of the shopkeepers who had come to the *Méla*, while on the other hand, the Police preferred certain charges against the *Méla* people, accusing them of having forcibly compelled traders to go to their *Méla*. Babu S. C. D. in his judicial capacity accepted all the complaints by the Police and set them down for hearing, while he was reluctant to take any action on the complaints brought by the shopkeepers. On the 22nd February, the Sub-Inspector of Police reported to Babu S. C. D. through the Inspector that a constable under him had been obstructed in the discharge of his duty on the previous day by two of the men who had preferred charges against the Police. On this report Babu S. C. D. passed the following order: "Police to send up rioters under section 353 Penal Code," and in accordance with this order sent up two of the complainants against them on a charge under that section. On the 25th February, a further complaint was made by a Head-Constable of Police at the Police Station charging the Vice-Chairman of the Municipality, one of the principal supporters of the *Méla*, with having been a member of an unlawful assembly in his own house with the intention of beating the Police, but that the unlawful assembly were uuable to carry out their intention, inasmuch as the constable had taken shelter in the Police Station. While these charges and counter-charges were being preferred, Babu S. C. D. instead of waiting till the 9th March, suddenly opened his *Méla* at Line Jamalpur about the end of February and attempted, with the assistance of the Police, to induce traders and shopkeepers to stay away from the public *Méla*, and to attend his own. Early in March several of the complainants and accused persons

connected with the public *Méla*, applied to the Magistrate of the District to transfer all the cases then pending before Babu S. C. D. to some other Magistrate, on the ground that Babu S. C. D. was personally interested in their result. Mr. G. felt bound to accede to this prayer and he transferred all the cases then pending to the Court of another subordinate of his—a Deputy Magistrate, Babu A. K. B. in the town of Maimansingh. However, the day before the order of the District Magistrate to transfer the cases reached Babu S. C. D. he himself instituted certain cases against some of the men, and charged the mukhtear or legal practitioner, who had objected to his trying the cases, with perjury, in having made, as he alleged, a false statement in a petition filed by him on behalf of some of the supporters of the public *Méla*. After the transfer of the cases to the Court of Babu A. K. B., he, before he had been spoken to by the District Magistrate, discharged four of the accused persons sent up by the Police on the 14th March. On the 15th, however, that is, the next day, Mr. G., the District Magistrate, sent for Babu A. K. B., while he was trying some of these cases and had half-an-hour's conversation with him. Babu A. K. B.'s attitude towards the public *Méla* people changed considerably after this interview with his official superior, and he convicted three of the defendants as being members of an unlawful assembly, and sentenced them to pay a fine of Rs. 20, the sentence being unappealable. Two persons who had been charged by the Police with obstructing them, the same Deputy Magistrate sentenced to 31 days' rigorous imprisonment, declining to summon Babu S. C. D., who had been cited as an important witness by the defence. These two persons appealed to the Sessions Judge who acquitted them both, disbelieving the evidence adduced against them. The Sessions Judge concluded his judgment thus :—

"In conclusion, I think that the reasonable and proper construction to be put upon the case is that the Police used undue pressure to prevent people from attending the *Méla*, and that any conflict that may have arisen between the Police and the others, was the consequence of the unwarrantable and forcible interference of the former. This is the probable interpretation as shown by the evidence for the defence, and specially of the respectable witness, Gobind Prasad Neogy, whose testimony appears entitled to full credit."

With respect to a case brought against two other persons, belonging to the public *Méla*, of wrongful restraint, Babu A. K. B. refused to acquit the accused, although by law he was bound to do so when the

complainant did not appear and gave no evidence. In consequence of Babu A. K. B.'s determination to proceed with the case, the Sessions Judge was appealed to, to interfere, and he at first hesitated to believe that any Magistrate could proceed contrary to the express provision of the law, and suggested that a fresh application should be made to Babu A. K. B. on the subject.

The second application to Babu A. K. B. having been ineffectual, the Sessions Judge passed an order to the effect that the Deputy Magistrate's action was contrary to law and that he should stay proceedings pending a reference to the High Court on the subject, the Sessions Judge being by law unable to give any relief himself. On receipt of this order Babu A. K. B. abruptly aquitted the accused. In another case originally brought by the Police before Babu S. C. D., in which three persons were accused of using fraudulent weights, Babu A. K. B. sentenced two of the accused each to nine months' rigorous imprisonment.

On appeal, the Sessions Judge in May acquitted both prisoners on the evidence, remarking that the Sub-Inspector had acted unfairly in making a raid on the shopkeepers in the public *Méla* while leaving the shopkeepers of the rival *Méla* "unmolested." As regards the cases brought against the Police, Babu A. K. B. dismissed them all. Meanwhile Babu S. C. D., the Deputy Magistrate in charge of Jamalpur, wrote a letter to Mr. G. asking for permission to prosecute two persons on a charge of perjury for having made certain allegations which Babu S. C. D. characterised as false, in a petition filed before him objecting to be tried by him. Mr. G. thereupon passed this order:—"The prosecution is sanctioned under section 193, or any other section that may appear necessary. Made over to Moulvi Mahomed, Deputy Magistrate, for trial." On the same day Moulvi Mahomed, another subordinate of Mr. G., equally afraid of incurring the displeasure of Mr. G., without recording any evidence whatever, at once, on the receipt of Mr. G.'s sanction, issued warrants for the arrest of the two men concerned. An application was thereupon made to the High Court at Calcutta setting out all the facts in detail, and praying that all the convictions referred to above might be quashed, and that the proceedings in the so-called perjury case should also be quashed, on the ground that the whole of the proceedings of the Magistracy of Maimansingh were *mala fide* and perverse. The High Court, consisting of the Chief Justice and Mr. Justice Chunder Madhub Ghose, quashed all the convictions and proceedings of the different Magistrates concerned as illegal and improper. In the result while all the prosecutions instituted by the

Police and the Magistracy ended in the acquittal or the discharge of the accused, nothing could be done as regads the complaint preferred by the public *Méla* people which had been summarily rejected or dismissed, and whose grievances therefore remain unredressed so far as the criminal courts are concerned.

The whole of the proceedings were subsequently reviewed by Sir Steuart Bayley, then Lieutenant-Governor of Bengal, who, in an elaborate Resolution, dated 31st August, 1887, after pointing out in detail some of the facts narrated above, passed orders not only inflicting punishment on the different magistrates concerned, but also censured the Commissioner of the Division for having neglected to interpose his authority in order to prevent what was, in the Lieutenant-Governor's opinion, a grave scandal. Sir Steuart Bayley felt it to be his duty to examine the facts of the case minutely, and came to the conclusion that the action of the local magisterial authorities was wholly unjustified. The following four paragraphs are extracted from the Lieutenant-Governor's Resolution, and special attention is drawn to the remarks contained in paragraph X. The more important passages have been printed in italic type :—

VI. The Lieutenant-Governor has dealt at some length on these matters, because he considers action like that taken by Mr. G. to be mischievous. It is manifestly impossible to expect native gentlemen to co-operate with a Government officer in voluntary works of public utility if they know that they are liable to be overriden and thrust aside as the *Méla* Committee has been in the present case, and the effects of such injudicious action as that under comment extends far beyond the particular case concerned, for it tends to create a breach between the most active members of the local public and Government officials, which cannot fail greatly to limit the influence and capacity for usefulness of the latter class.

. . . . . . . . .

X. In the opinion of the Lieutenant-Governor *these proceedings involved a grave misuse of judicial authority*. Sir Steuart Bayley does not see the slightest reason to suppose that there would have been a breach of the peace if the Police had not interfered and by their action brought on a semblance of disturbance which was made the excuse for a harassing series of criminal cases, all of which can be traced to the fact that the Magistrate of the district disapproved of the way in which a *Méla* was being managed by an independent Committee and superseded them without authority. *The whole case is a striking illustration of the danger and in convenience of the union of executive and judicial functions in*

*the same officer* when that officer happens to be indiscreet and intolerant, but as this union is for the present essential, the practical lesson to be drawn from it is the necessity for extreme vigilance on the part of controlling and supervising officers, and the magnitude of the evils attendant on failure in this respect. *It is clear to the Lieutenant-Governor that years of patient and careful working on proper lines can scarcely undo the mischief and remove the prejudice against the existing system produced by a single case like the present,* where the indiscreet and improper proceedings of the local officers are left unchecked by the Commissioner, whose special duty it is to supervise their action.

"XII. On a review of all these unfortunate proceedings it is impossible to acquit the District Officer, Mr. G., who must be held mainly responsible for them, of grave errors of judgment, of want of temper and arbitrary conduct. The same remarks apply, though in a less degree, to the Sub-Divisional Officer, while the failure of Mr. L. adequately to grasp the responsibilities of his position as Commissioner is disappointing. The Lieutenant-Governor sees nothing to find fault with in the conduct of the Sub-Divisional Officer at the outset. His report to the Magistrate of the 4th November shows that he clearly understood the character of the *Méla* and the position of the Committee, and he then gave sound and judicious advice to the Magistrate which, if followed, would have prevented all the mischief which has occurred. The Magistrate having rejected his recommendation in his ill-considered order of the 18th December, the Deputy Magistrate did not offer any advice when forwarding the proceedings of the *Méla* Committee meeting on the 25th December, after he had received the order to carry on the *Méla* himself as Sub-Divisional Officer with the assistance of a Committee who were overridden by that very order. He seems to have identified himself completely with Mr. G.'s policy, and to have fought the committee with all available weapons. His conduct from this time was a long series of blunders and perverse acts, while much of his reports to Mr. G. amounted to distortion of the actual facts. He had an opportunity of retreating from his false position by acting on the suggestion made by Mr. G. in reply to his letter of 5th January, but failed to avail himself of it. It is obvious, however, that he believed himself throughout to be acting in harmony with the Magistrate's views, and there was only too much to satisfy such a belief on his part. His Honour is satisfied of the Babu's unfitness for the place he occupies, and an arrangement will be made for his early removal.

"XIII. The task of reviewing Mr. G.'s action throughout this case is a difficult and unpleasant one. He is an experienced officer who has

hitherto borne a fair reputation, and the Lieutenant-Governor has anxiously tried to take the most favourable view of his conduct which the facts will allow. He is, however, compelled to remark that some points have left a painful impression on his mind. Among these are Mr. G.'s silence on the subject of removal of the image and hut of *Kali* till attention had been called to it in the press, although the matter was more than once referred to in papers which came before him; his remark that the Sub-Divisional Officer was to be assisted by the Committee in carrying on the *Méla*, the order being passed on the proceedings of a body claiming to be the Committee which had removed the Sub-Divisional Officer from the post of Chairman; the misleading remark on the report to the Commissioner on the 7th March that there had been a local dispute about some rival fairs at Jamalpur, and the ambiguous orders given to the Sub-Divisional Officer regarding the *Méla* started on the new site. Assuming that these omissions and ambiguities were the results of heedlessness, there still remains the fact that nothing but Mr. G.'s indiscreet interference with the Committee's method of celebrating the *Méla* led to the decision to have an unofficial Chairman, and to sever themselves from the Deputy Magistrate's management. Mr. G. next refused to accept this decision, or even to enquire into the representation made to him, and insisted on the Deputy Magistrate continuing to manage the *Méla* and retain the funds and property of the institution, with which, save in the matter of withholding the use of the Government land, he had no longer any claim to be consulted. Then when the rival *Méla* was started, and the Police, acting under the supervision if not at the instigation of the Deputy Magistrate, began a series of arbitrary arrests to obstruct it, the District Magistrate, instead of at once putting a stop to the prosecution and staying the arbitrary proceedings of his subordinate, allowed the case to proceed, passed the weak and injudicious order to the Deputy Magistrate about proceedings under Section 144 of the Criminal Procedure Code, arbitrarily dismissed the Goverment Pleader and suspended the Sub-Inspector of Schools almost avowedly for the part they had taken in support of the rival *Méla*, sanctioned what he ought clearly to have seen was an unjustifiable prosecution by the Deputy Magistrate under Section 193, Indian Code, and so through his mismanagement and remissness, caused what before was a trivial and unjustifiable exhibition of local feeling to grow into a grave public scandal rendering necessary the intervention of the High Court to prevent further injustice. Sir Steuart Bayley has anxiously considered whether he is justified in allowing Mr. G. to continue

in the first grade of Magistrates and Collectors. He has decided, though with much doubt, that the general good service rendered in the past by Mr. G. may now be counted in his favour, and that the Government may be spared the pain of degrading him, especially as after the present case he must forego all hope of further promotion. But his Honour considers that it is no longer safe to entrust to him a district so important and difficult to manage as Maimansingh, and arrangements must be made as soon as possible for his removal to a lighter charge."

As regards the proceedings of Babu A.K. B., the Lieutenant-Governor in a separate Resolution passed the following orders :—

"3. As regards the prosecutions for using false weights, it is to be feared that the severe sentences were inflicted with the object of punishing men who in the matter of the *Méla* had taken up an attitude of hostility to the Sub-Divisional Officer of Jamalpur; but even putting the most charitable construction on the motives of the Deputy Magistrate, Sir Steuart Bayley cannot but come to the conclusion that the gross carelessness and want of judgment in this and the other cases cannot be adequately punished by the most severe reprimand.

"4. His Honour therefore directs that Babu A. K. B. be degraded to the bottom of the sixth grade of the Subordinate Executive Service, and that he be deprived of his first class powers. He will remain at the bottom of the 6th grade until satisfactory reports are received from his superior officers regarding his work and industry. On the receipt of such reports, the Lietenant-Governor will then consider the question of restoring to him first class powers, and moving him to the top of the sixth grade in order that he may become eligible for promotion to the fifth grade. The Deputy Magistrate will also be transferred to the headquarters of the District of Dinagepur."

It may be mentioned here that Mr. G., the Magistrate referred to in the case, was a senior officer of many years' standing, and that the Resolution from which extracts are given above created a great sensation among the members of the Executive Branch of the Bengal Civil Service, who as a body strongly disapproved of the vigorous action which Sir Steuart Bayley had been forced to take against a member of their own service. Accordingly an agitation was set on foot by some members of the Bengal Civil Service against the action of Sir Steuart Bayley, and Mr. G. was induced to prefer an appeal to the Government of India against the orders of the Lieutenant-Governor. The Government of India was led to modify only that portion of Sir Steuart Bayley's order which directed that Mr. G. should forego all further

promotion, as, in the opinion of the Government of India, such a direction as regards the future ought not to have been made. The grievance of the Executive Branch of the Civil Service in connexion with this case appeared to be that by his action Sir Steuart Bayley had publicly exposed the proceedings of a District Officer and many of them felt, and urged in the columns of the public press, that if the Government were to take such action as Sir Steuart Bayley had done the prestige of District Magistrates as a body would be lowered. As regards the proceedings of the Subordinate Deputy Magistrates, the general feeling in Bengal was that few Deputy Magistrates, if placed in the position in which Babus S. C. D. and A. K. B. had been placed, could have had the courage to act differently.

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## XVI.—THE CONTAI CASE. (1889)

In this case Bikanta Nath Hazra, a pleader practising in the Munsiff's Court in the sub-division of Contai in the district of Midnapur, had bought a plot of land near the sub-divisional Court-house at Contai for Rs. 1,150, and after his purchase he had taken possession of the land as well as of the building and tank situated thereon. Subsequently a claim was asserted by the sub-divisional Magistrate on behalf of the Collector of Midnapur, who represented the Government, that the tank in question was partly situated on Government land. In order, however, to avoid all litigation Bikanta Nath Hazra in October, 1886, applied to the sub-divisional Officer of Contai to put an end to all dispute by settling at a reasonable rent that portion of the tank to which the Government had asserted a claim. Bikanta Nath Hazra, after taking possession of the tank, spent about Rs. 400 in excavating it, with the knowledge of the sub-divisional Officer. Certain personal differences having arisen between the sub-divisional Officer and Bikanta Nath Hazra, the former reported to the Collector and Magistrate of Midnapur, Mr. V., that he disapproved of a portion of the tank being settled with Bikanta Nath Hazra. In April, 1889, Mr. V., the Collector of Midnapur, on the suggestion of the sub-divisional Officer, objected to make the settlement of the tank with Bikanta Nath Hazra, whereupon the latter presented certain petitions to the Collector of Midnapur, urging that, although the claim of Government was based upon certain errors in a certain measurement paper, he was willing, in order to avoid all litigation, to take a settlement of the disputed tank at a reasonable rent. To these petitions Bikanta Nath Hazra received

no reply until the 13th May, when Babu B. K. B., then sub-divisional Officer of Contai, wrote to Bikanta Nath Hazra to say that the tank was to be kept *Khas* (in the possession of the owner) for the present under the orders of the Collector, and it could not be settled with Bikanta Nath Hazra. The letter ended with these words: "Please, therefore do not interfere, with the tank in any way." Bikanta Nath Hazra, believing that the Collector of Midnapur had no authority to oust him from any portion of the said tank without a decree of the Civil Court continued to remain in possession of the tank. On the 21st May proceedings were instituted in the Court of the Second Deputy Magistrate of Contai under section 145 of the Criminal Procedure Code, so that the Magistrate might be in a position to decide summarily who was in actual possession of the tank. After the issue of the summons in this section 145 case, it struck the magisterial authorities that such a case must necessarily result in Bikanta Nath Hazra being maintained in possession of the tank, and accordingly the proceedings were dropped. On the 23rd May, however, an order was issued by Babu B. K. B., sub-divisional Officer of Contai, who purported to act as a judicial officer, calling upon Bikanta Nath Hazra to show cause within seven days why he should not be prosecuted under the Penal Code for having disobeyed the order contained in his letter of the 13th May, namely, " Please therefore do not interfere with the tank in any way." Bikanta Nath Hazra accordingly showed cause, and contended that the order in question was not lawful, and not one which he was bound to obey, and that, therefore, he had committed no offence under section 188 of the Penal Code on the admitted facts of the case. Inasmuch as the Magistrate of the District had sanctioned and approved of this criminal prosecution, Babu B. K. B. refused to drop the case, and passed the following order on the 15th June: "Prosecute Bikanta Nath Hazra under section 188 Penal Code. Case made over to Babu S. P. Sircar (another Deputy Magistrate) for trial." At the time of passing this order, in reply to a remark of Bikanta Nath Hazra's Pleader, that such a prosecution would be vaxatious and serve no useful purpose, the Deputy Magistrate remarked in open court: ' You do not see my peculiar position in the matter," undoubtedly referring to the prosecution having beun inspired by the Magistrate and Collector of the District, Mr. V. The case was taken up on the 15th June by Babu S. P. Sircar, who fixed it for the 25th of that month, but subsequently intimated to Bikanta Nath Hazra that he should try to move the High Court and relieve him from the unpleasant task of trying such a case,

and gave him time for that purpose until the 10th July. Bikanta Nath Hazra thereupon moved the High Court on the ground that the prosecution was not *boná fide* and that its only object was, by harassing him, to compell him to abandon possession of the tank. On the application of Bikanta Nath Hazra the High Court issued a rule, and on the 29th July, after reading the explanations submitted by Mr. V., made the rule absolute, setting aside all the proceedings, at the same time remarking: "We do not think this prosecution was rightly instituted."

Cases of this description, though petty in character, are by no means uncommon; but in the vast majority of such cases the aggrieved person would rather submit to the dictates of the Magistrate of the District than bear the expense and trouble of moving the High Court at the risk of incurring the displeasure of the local authorities.

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## XVII.—THE SERAJGUNGE CASE. (1891)

Two Zemindars in the sub-district of Serajgunge, named Chandra Kishore Munshi and Dinendra Nath Sanyal, had some altercations regarding their respective shares in the rents of certain lands in the Serajgunge sub-division of the District of Pubna. Dinendra Nath Sanyal claimed a portion of the rents which the tenants were paying to Chandra Kishore Munshi, and managed to enlist on his behalf the sympathies of Mr. B., the Collector and Magistrate of the sub-division of Serajgunge. Mr. B. summoned Chandra Kishore Munshi to his private residence on Sunday morning, 7th June, 1891, and told him that he would not be allowed to depart until he had made up his dispute with Dinedra Nath Sanyal, who was also present on the occasion, and until he had signed an agreement to that effect, adding that in case of refusal Chandra Kishore Munshi should be at once arrested and sent to the lock up on a charge of hiring club men. Chandra Kishore Munshi was then detained without food for some hours, and seeing no means of escape from the prosecution with which he was threatened, he intimated in the afternoon his readiness to obey the Collector's orders. Mr. B. then wrote out the desired agreement, which both parties signed in the presence of two police officers, who were called to witness the execution of the deed. Some days later Chandra Kishore Munshi, on being requested to appear before the Registrar of Deeds and acknowledge his signature to the agreement, refused to do so on the ground that the signature had been obtained by coercion. Thereupon Dinenda Nath Sanyal brought a civil suit to enforce the registration of the agreement, and eventually obtained

a decision in his favour from the Subordinate Judge of the District. From that decision Chandra Kishore Munshi appealed to the High Court at Calcutta on the ground that the deed, having been extorted from him by Mr. B. by coercion, he was not bound by law to register. The High Court, consisting of Mr. Justice Norris and Mr. Justice Banerjee, on the 17th August, 1894, when the appeal came on for hearing, reversed the decision of the Subordinate Judge and made the following remarks :—

"There cannot, we think, be a shade of doubt that the defendant's signature to the agreement was obtained by duress and intimidation. Mr. B.'s evidence is conclusive on the point. We are of opinion that the defendant's signing of the agreement under the circumstances was not an execution thereof within the meaning of the Act ; indeed, it was no execution at all. Execution must mean voluntary execution—that is, the signing of the document of the executant's free will. It could not possibly be contended that, if Mr. B. had forced a pen into the defendant's hand, held it there, and by force guided the hand to write the signature, such a signing was an execution in law ; and there is no difference between the two cases. We think, therefore, that the appeal must be allowed. We cannot conclude this judgment without expressing our unqualified disapproval of the conduct of Mr. B. in this matter, as disclosed in his own evidence ; his novel but apparently illegal method of replenishing the Lady Dufferin Fund is not before us, and we say nothing about it. A copy of this judgment will be forwarded to the Local Government."

As stated above, the Judges forwarded the papers of the case to the Lieutenant-Governor of Bengal for such notice as the Government might be induced to take regarding the unwarrantable conduct of Mr. B., but Sir Charles Elliott, then Lieutenant-Governor, unlike his predecessors in that office, refused to take any action, and declared in the Bengal Council in answer to a question, that he had sent a copy of the judgment to Mr. B., but, after a careful consideration of the whole case he had come to the conclusion that it was not necessary for him to interfere further in the matter. The facts of the case were all admitted by Mr. B. himself in his evidence given before the Subordinate Judge of Pubna, and it was perfectly clear that Mr. B. threatened to make improper use of his judicial powers in order to force Chandra Kishore Munshi to execute the deed, and also to extort from him, as admitted by Mr. B. himself, a large sum of money as a subscription to the Lady Dufferin Fund. The evidence of Mr. B. upon this point was in these words :

"Both sides promised in writing to pay a subscription of Rs. 1,000 each to the Lady Dufferin Fund if they would leave Serajgunge without my permission. In my previous deposition I said: 'I took recognisance bonds from Dinendra Nath Sanyal and Chandra Kishore Munshi for Rs. 1000 each to be forfeited to the Lady Duferin Fund.' "

Supporters of the present system of combining executive and judicial authority in the District Magistrate naturally apprehend that such a hold as Mr. B. possessed over the Zemindars of his district would be weakened by a separation of the two functions, and herein lies the secret of their strenuous opposition to the proposed separation. This case futher illustrates what is really meant by those who insist upon the prestige of the District Magistrate being upheld by investing him with judicial powers.

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## XVIII.—The SARARCHAR CASE. (1892)

The proceedings in this case were published in pamphlet form by Mr. H. N. Morison, barrister-at-law in Calcutta, in May, 1893, under the title of "Official prestige *versus* the Liberty of the subject; A case illustrative of the danger of investing District Magistrates in India with judicial powers." The facts, as summarised from the evidence, were as follows: One Sarat Chandra Ray was a landholder in the village of Sararchar, in the district of Maimansingh; he had been once a wealthy landlord, but was in reduced circumstances at the time of the occurrence. In January, 1892, Mr. P., the District Magistrate of Maimansingh, went out on tour in the interior of the district. One morning, about two o'clock, a bullock-cart, containing various articles belonging to Mr. P., arrived at the Sararchar Bazar, in charge of a cartman. The cart was left in the middle of the road, and the man in charge was apparently asleep: about an hour after Sarat Chandra Ray, accompanied by some men came to the Bazar while under the influence of liquor, and, happening in the dark to stumble against the cart, fell down. Enraged at this, Sarat Chandra Ray struck the cartman with a cane, and asked him why he had kept the cart in the road. The man replied that the cart belonged to the Magistrate of the District. The drunken man thereupon made use of some contemptuous epithets with reference to the District Magistrate, and went to the house of the woman named Shyama, where he misbehaved himself by breaking the mat wall of her house and assaulting her; in the morning, however, he himself caused the mat wall to be restored. His companions, how-

ever, did nothing during the night and his servant, one Peer Mohamed, merely carried a lantern. The woman Shyama did not at first think it worth while to prefer any complaint against Sarat Chandra Ray.

The next morning Mr. P. arrived, and was informed of the occurrence during the night, and especially of the fact that Sarat Chandra Ray had spoken contemptuously of the District Magistrate. At the same time it was reported by one of his servants that a tin box, which had been tied to a table on the cart, was missing. The possibility of the box having fallen off an open cart while in motion when the men were probably asleep did not suggest itself to Mr. P. in his then excited state of mind. On hearing of the occurrence, he at once proceeded to record the depositions of his servants, and immediately issued a warrant for the arrest of Sarat Chandra Ray and his unknown companions on charges of rioting, hurt, and theft. He also directed that the woman Shyama, who had made no complaint, should be sent up to him. The evidence, however, did not in the least justify the arrest of Sarat Chandraa Ray's companions or of the man who happened to carry the lantern. Instead of preferring any complaint himself and appearing as the prosecutor before the Police Officer, Mr. P. proceeded to vindicate his dignity and prestige, which he imagined had been set at defiance by the drunken man, by himself issuing the warrants of arrest. Not content with issuing the warrants, Mr. P., without a particle of evidence, issued a second warrant directing the Police to enter the house of Sarat Chandr Ray and search his premises, "using reasonable force if necessary," and he further declared that Sarat Chandra Ray's house was used for receiving stolen goods. The house was searched by the Police, but nothing was found. On the next day—namely, 29th January—one Nazu Sheikh brought to Mr. P. his tin box with all its contents (two or three books, some stationery, etc.), and stated that a chaukidar or rural watchman named Umed Ali had picked it up very early in the morning of the previous day on the road, where it might have fallen off the cart at night. On finding his box, Mr. P. evidently wavered in his mind as to whether the charge of theft against Sarat Chandra Ray could be maintained, and accordingly he proceeded to give the following direction: "as to the theft of the box, I do not think there is sufficient evidence to submit *A* form;* the case must be fully investigated. The Police have got the clue. Umed Ali, chaukidar, left the box at the house of Nazu Sheikh. The chaukidar has not been produced." Later in

* An *A* form is a form sent by the Police when the case is said to be in their opinion proved.

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the day the chaukidar appeared before Mr. P., and gave his deposition, to the effect that he had picked up the tin box on the road, and he was corroborated by the *Panchayet* or head man of the village. Mr. P., without any grounds, professed to disbelieve the chaukidar's evidence, and directed the Police to enquire if he could not be made an accused, remarking that his case would fall under section 414 of the Penal Code, namely, assisting in concealing stolen goods. At 3 p.m., on the 27th January, the Police recorded two complaints, one by the cartman and the other by the woman Shyama, who in the meantime had been induced by the Police to come forward and complain. The Indian Procedure Code requires that the Police should proceed to investigate a case after the receipt of a complaint called the First Information. In this case, however, the Police had been directed to make the investigation by the real complainant Mr. P., the day before any formal complaints were lodged, but before the Police had recorded any formal complaint, Mr. P. gave them this direction : "Police to submit *A* form, sections 147 (rioting), 379 (theft), 457 (house-breaking by night), 458 (house-breaking by night after preparation to cause hurt). Sarat Babu and Govind Singh to be shown as absconders." The Head Constable of Police, to whom the search warrant had been directed by Mr. P. on the 26th January, lost no time in reporting on the same day that he was unable to find Sarat Ray in his house, and on the next day, the 27th, Mr. P. issued a proclamation calling upon Sarat Ray to appear within 31 days, and in the same breath he directed that his house and all movable property in it should be attached. The result of this extraordinary proceeding was that on the evening of the 27th January a large Police force went to Sarat Ray's family residence and took possession of all articles, including those for domestic use, such as bedding, etc., and the wearing apparel of the ladies of the family, as well as the jewellery on their persons. The report of the Sub-Inspector of Police, who made the attachment, showed that 181 articles were removed from the house to the Police Station, a distance of four miles, and that the only properties not removed were of an immovable character—even the cows were taken away to the pound. Similar action was taken with regard to the articles found in the house of Govind Singh, then supposed to have been an accomplice of Sarat Ray. From the various orders passed by Mr. P. in connexion with the case, it was evident that the Police were acting entirely under his directions. Umed Ali, chaukidar, was at once arrested and sent up in custody, charged, as suggested by Mr. P., under section 414 of the Penal Code ; the servant who had carried the lantern was

also, under Mr. P.'s orders, taken into custody and sent up by the Police, although he was accused of doing nothing more than merely carrying the lantern. Having got the Police to submit *A* forms for offences which were all unbailable (except rioting and hurt) in the two cases ostensibly instituted by the cartman and the woman Shyama, and having got them also to remove every household article from the premises of Sarat Ray, Mr. P. now proceeded to choose his own tribunal for the final disposal of the two cases. Ordinarily they would have been triable by a Bengali gentleman, the Sub-Divisional Magistrate of Kisoregunge, within whose jurisdiction Sararchar lay. He happened, however, to be a Magistrate of the first class, and, though fully competent to try the charges, an appeal from his decision would by law lie not before Mr. P., but before the Sessions Judge. Mr. P. would not trust that magistrate or any other magistrate with first-class powers, but, without assigning any reason whatever as required by law and in the exercise of his powers as District Magistrate, ordered, on the 1st February, that "the cases will be tried by Mr. H.," then an Assistant Magistrate exercising only second-class powers, and therefore subject to the appellate authority of Mr. P. himself. The result of this order was that the case was removed from Kisoregunge Sub-Divisional Court to a distance of about forty miles, and this order was deliberately passed although Mr. P. knew that one of the charges which he had himself made against the men was for an offence under section 458 of the Penal Code, which was unbailable, and could not legally be tried by Mr. H. or by any second-class magistrate.

On the 5th February, one of the alleged companions of Sarat Ray appeared before Mr. H. and prayed that a month's time might be given to enable the accused person to move the High Court in Calcutta to transfer the case to another district. As under the law Mr. H. could not refuse this application, he adjourned the hearing of the case to the 4th March. Sarat Chandra Ray evidently was afraid to appear before Mr. P. or his subordinate Mr. H. until he felt sure he would be allowed an opportunity of moving for a transfer of the case to a district where the magistrates would not be under the influence of Mr. P., and accordingly he appeared before Mr. H. on the 8th February, two days after he learned that he had got that opportunity. On his appearance Mr. H. ordered the release of the attached properties, which were returned to him on the 16th February. Sarat Chandra Ray engaged a Pleader to defend him who happened to be the Vice-Chairman of the District Board under Mr. P. who was the Chairman, and this Pleader advised him to abandon his attention of moving the High Court for a transfer.

On the 4th March, however, Sarat Chandra Ray objected to Mr. H. trying the case on the ground that the charge under section 458 was by law not triable by him. The case was therefore adjourned to the 8th March. Sarat Ray's Pleader had a private interview with Mr. P. What passed at this interview was not disclosed on the record, which only shows that the Pleader agreed to waive the objection as to the jurisdiction of Mr. H. and gave Mr. P. to understand that he had advised his clients "to throw themselves on the mercy of the Court." Mr. P. now found that there was no chance of the case going to the High Court, and after Mr. H. had gone through the form of recording the depositions of the witnesses for the prosecution, Mr. P. sent a note to his subordinate Mr. H., in which he stated, "I have no objection to the Assistant Magistrate giving consideration to such plea (accused to throw themselves on the mercy of the Court) and dealing with the case leniently; of course if they do not care to do so the case will be tried out. Babu Ishan Chandra Chakravarti, the Pleader, tells me he has instructed his client to this effect, and I have told him I will record what I have said to him, and write to the assistant Magistrate to place it on the record. On the same day Sarat Ray under the advice of his Pleader, made a statement in which he admitted that he had given one cut to the cartman, but went on to say that he did not beat any woman and that coming in contact with the bullock cart he had, being drunk, fallen down, adding, "I did not run away but went to make arrangements for my brother who was sick." This statement was described by Mr. H. as "a confession" and Sarat Ray was sentenced to a fine of Rs. 120, Mr. H. rightly remarking "that the disturbance was more a drunken freak than anything else." There being no evidence against Umed Ali, chaukidar, the man who had picked up the tin box and had the honesty to return it to Mr. P., he was discharged after having been detained in custody from the evening of the 27th January to the 5th February. Similarly the man who carried the lantern was also discharged having remained in prison for the same period.

Perhaps a "drunken freak" like the one in which Sarat Chandra Ray had indulged on the night of the 25th January deserved some notice, but it is clear from the beginning Mr. P. must have known that the man had been guilty of nothing more than a "drunken freak"; and it is open to considerable doubt whether if Sarat Chandra Ray had not had the misfortune to stumble over a cart belonging to the District Magistrate, the ladies of his family would have been subjected to all the indignity and harassment to which they were forced to submit.

## XIX.—THE MAIMANSING CASE. (1892)

Raja Surya Kant Acharya Bahadur, one of the wealthiest landowners in Bengal, was in 1887, on account of his public charity, invested by the Government with the title of Raja Bahadur. Among his numerous public donations may be mentioned a sum of Rs. 1,12,500 (one lakh twelve thousand five hundred) almost equal to £10,000 to the Municipality of Maimansingh for the introduction of water-works into the town. In February, 1891, Mr. P. of the Bengal Civil Service, took charge of the office of District Magistrate and Collector of Maimansingh and soon discovered the great influence which the Raja by reason of his wealth and position exercised in the district In a short time the Raja happened to incur the displeasure of Mr. P. who began to prefer a variety of complaints against him to the higher executive authorities. In November 1891, Mr. P. suggested that the Raja's name should be removed from the list of members of the Maimansing District Board, on the ground that he had absented himself from six or more consecutive meetings. The Lieutenant-Governor, however, declined to accede to this recommendation on the ground that "Raja is the chief landowner of the district and has contributed largely to the improvement of the town, and it is desirable that he be retained on the Board, and as long as he wishes to continue to be a member, the Lieutenant-Governor would not deprive him of his membership."

As regards the municipal administration of Maimansing, Mr. P. soon after his arrival expressed his dissatisfaction with the manner in which the Local Municipalities managed their affairs and complained of the Raja's influence over the Municipal Commissioners in Muktagacha, his native village, as well as over the Municipal Commissioners in the town of Maimansingh. About the year 1886, the Raja had begun to build a palace on a plot of land in the town of Maimansing. Immediately to the east of this plot were the houses or huts of some four or five tenants of his, separated by a footpath, which existed chiefly for the use of those tenants. The Raja induced these tenants to remove from the locality on receipt of compensation, and a few years later obtained the permission of the Local Municipality, who had claimed the footpath as their property under the Municipal Act, to include the site in his premises, when the footpath or bye-lane should no longer be required by the tenants. After the removal of the tenants the Municipality allowed the Raja to take possession of the bye-lane on his making over to them without compensation two other strips of land which they wanted for public purposes. In August, 1891, while the

Raja's engineer was building an enclosure wall round the grounds, the Municipal overseer complained of what he then imagined was a slight encroachment by the wall, and of some accumulation of rain-water in the drain at the foot of the wall. This led to a deputation of two Commissioners, one a Deputy Magistrate, the other a District Engineer, to wait upon the Raja, who did not think there had been any encroachment; and after remarking that he would do nothing under compulsion, agreed to remove all possible grounds of complaint by building at his own cost a masonry drain outside the wall, or, in other words, to help the Municipality to improve their own roadside drains round his palace, so that the rain-water might not stagnate anywhere or be absorbed in the soil. Owing to this offer the Municipal Commissioners took no further notice of the supposed encroachment, and pending the construction of the masonry drain the Raja's manager caused a suitable ditch to be dug in order to let off any water that might have accumulated there. This ditch, however, was subsequently closed by the Municipality, apparently without any reason. From the middle of November, 1891, to the end of April, 1892, the Raja was absent from Maimansingh on shooting excursions, but before leaving he had left instructions with his agents to construct the drain before the ensuing rainy season. About the end of April, 1892, Mr. P., the District Magistrate, happened to visit the locality, and finding, as he alleged, some rain-water accumulating in the Municipality drain outside the Raja's wall after a heavy shower, learned on enquiry of the complaint regarding the alleged encroachment and also of the offer made by the Raja to construct a masonry drain round his palace. On finding, however, that the promised masonry drain had not been constructed, Mr. P., on the 30th April, called for all the papers of the Municipality to consider what he should do. The Raja returned to Maimansing early in May, and immediately wrote to the Municipality requesting their permission to begin the work, which permission, however, was withheld by the Municipal Commissioners on the ground that Mr. P. was then considering the matter. The Raja thereupon wrote to Mr. P. in order to avoid further delay, but was informed in reply that fitting orders would be passed. On the 18th May Mr. P. recorded an elaborate proceeding or complaint in his capacity as District Magistrate, instituted a criminal prosecution against the Raja, and made over this proceeding to Mr. H., his Assistant Magistrate, for trial. In this complaint Mr. P. accused the Raja of having committed the offences of public nuisance and mischief and under other sections of the Penal Code, and ordered

the Raja to be tried under these sections "or any other law which might be applicable." The prosecution had reference to two distinct matters: first, the supposed encroachment on the drain above-mentioned, and, second, the filling up the ditch or drain which existed by the side of the foot-path or bye-lane, regarding which no complaint had ever been made by the Municipality. Having regard probably to the Raja's position, Mr. P., instead of leaving it, as the law required to the discretion of the trying Magistrate, took upon himself to order that the Raja's personal attendance during the trial should be dispensed with by Mr. H. On the 17th June the Raja's Counsel from Calcutta telegraphed to Mr. H. for two days' postponement of the case, on grounds of personal inconvenience, and at the same time asked the real prosecutor, Mr. P., to consent to the adjournment. Mr. P., the complainant and prosecutor, replied as follows: 'Case must be commenced Monday, but have directed trying Magistrate to postpone for your argument;" thereby showing that Mr. H. was merely to carry out the orders of the prosecutor. On the 18th June, after receipt of the counsel's telegram, Mr. P., of his own motion, recorded a further proceeding, offering to withdraw the case if within a week the Raja would demolish his wall, etc. On arrival at Maimansingh on Monday, the 20th June, the two Counsel whom the Raja had engaged saw Mr. P., and suggested that so trivial a matter should be settled amicably. In the conversation which ensued Mr. P., according to the statement of both Counsel, described Mr. H. as his "post office and conduit pipe." The Counsel asked for a day's postponement to enable the Raja to come to Maimansingh and arrange about an amicable settlement. At Mr. P.'s suggestion, a petition asking for time was presented the same day to Mr. H. who forwarded it to Mr. P. for orders. Mr. P. requested that the case might be postponed till the next day when the Counsel's proposals for a settlement would be recorded by Mr. H, and forwarded to Mr. P. The Raja reached Maimansingh the same evening, and the next morning at 9.30 one of his Counsel wrote a courteous letter to Mr. P. asking for an interview with a view of discussing the proposed terms. In this letter the Counsel stated that they did not see their way to advise the Raja to plead guilty to any criminal charge or "to consent to any arrangement which would in the least savour of any admission of guilt!' This letter seemed to give great offence to Mr P. who within half an hour sent a reply in which he declined to have any further communication written or verbal, with the Counsel, and concluded with the needlessly offensive sentence, "I shall be compelled to return any further written com-

munication." At the sitting of the Court of Mr. H. at 1 p.m. on that day, the 21st June, the senior Counsel for the Raja stated to Mr. H. his counter proposals, and took care to add that the Chairman of the Municipality was willing to accept either of his proposals as effective if Mr. P., as District Magistrate, would allow him to do so. Mr. H., who evidently knew the nature of Mr. P.'s intention, took upon himself to say that these were "perfectly useless," and without communicating with Mr. P., remarked in open Court, "My instructions are to go on with the case." On the Counsel begging that, in accordance with Mr. P's written instructions of the day before, the proposals should be sent for his consideration, Mr. H. forwarded them to Mr. P. On the same afternoon while Mr. H. was engaged in recording the examination-in-chief of the witnesses for the prosecution (the cross-examination having been reserved till the next day by arrangement), Mr. P. sent the District Superintendent of Police with about twenty constables, armed with rifles, and some coolies to break down the Raja's wall and to cut a drain through his land. Accordingly the Raja's palace was invaded, his wall was broken, and a drain cut through his grounds even before the expiration of the week allowed by Mr. P. in the order he had originally issued on the 18th June. The action of Mr. P. was followed by a prohibitory injunction issued by him, prohibiting the Raja from rebuilding the wall, at the risk of being prosecuted for disobeying the lawful order of a public servant. On the same afternoon, shortly after the wall had been broken, Mr. H. called upon the Counsel for the defence to produce the Raja in Court the next day, remarking that "the Raja must stand in the prisoner's dock like any other man." The Counsel repeatedly protested against this order as unnecessary and calculated needlessly to disgrace the Raja, bnt Mr. H. declined to cancel his order, and the Court adjourned at that stage till noon of the next day. Mr. P., as well as his subordinate Mr H., probably anticipated that the Raja would abscond, according to the practice of people in his position in Bengal, in order to avoid the indignity of standing in the prisoner's dock, and that his disappearance would be followed by the issue of warrants, attachment of property, proclamations, etc. The Raja, however, was better advised, and instead of following the usual custom, resolved to appear the next day, and despatched a telegram to the Lieutenant-Governor at Darjeeling, detailing what had happened.

On Wednesday, the 22nd of June, the Raja appeared at once and stood in the dock. Mr. H., who knew him personally, looked at him, and then called up a low-class Muhammadan prisoner, who was made to stand by

his side, and sentenced by Mr. H. on a charge of house-breaking by night. After this the Raja's Counsel mentioned to Mr. H. that the Raja had been suffering from fever. Upon this Mr. H. remarked: "If you like, Sir, you may take a seat in the body of the Court." The Raja keenly feeling the indignity of his position, declined the offer, adding: 'I can stand like any other man." At the close of the cross-examination of the witnesses on that day Mr. H. called upon the Raja to give substantial bail and to execute a personal recognisance for his appearance the next day, in spite of the protests of Counsel that these were wholly unnecessary and unusual under the circumstances. The Raja left the dock on signing the recognisance bond and giving the required bail. On the evening of the same day, after Court hours, Mr. P. and Mr. H. had a consultation, and Mr. P. then hit upon the idea of writing a letter to the Counsel for the Raja, with whom he had the day before declined to hold any further communication, throwing the whole responsibility of the Raja's appearance in the dock upon his Counsel. This letter was sent at 10-30 p.m. on the 22nd of June, and a reply was returned the next morning quoting Counsel's notes, showing that it was in consequence of an express order from Mr. H. that the Raja had been advised to appear and stand in the dock. The next day, the 23rd June, the Raja again appeared in Court, and this time he was advised to avail himself of the offer made by Mr. H. the day before, and to take a seat. On this occasion the attitude of Mr. H. was altogether different, as he, without any request or application being made on behalf of the Raja cancelled the bail bond and recognisance given the day before and intimated to the Raja that his attendance was no longer necessary. This was done, there are grounds for believing, by reason of telegraphic instructions which had been sent by the Lieutenant-Governor from Drajeeling on receipt of the Raja's message the day before.

The case proceeded on the 23rd June, and the prosecution being closed the defence prayed that the prosecutor, Mr. P., might be called or tendered for examination, but this application was refused by Mr. H. Mr. P ordered his subordinate Mr. H. to file on the records of the case a copy of his own letter addressed to the Counsel for the defence, and this order was at once complied with by Mr. H. who over-ruled Counsel's objection on the ground that he had been ordered by Mr. P. to file the document, but he declined to receive a copy of the reply which Counsel begged him in fairness to receive, in case he felt bound to admit the copy of Mr. P.'s letter containing statements the correctness of which had been challenged

in the reply. The case was again taken up on Saturday, the 25th June, after certain adjournments at the instance of Mr. H., who then called upon the defence to meet two charges, namely, one of mischief under the Penal Code, and the other a breach of a bye-law. The Pleader for the prosecution pressed Mr. H. to convict the Raja of the offence of public nuisance, but his application was not entertained. On the 9th June, Mr. H. gave judgment convicting the Raja of the offence of mischief and acquitting him of the breach of the bye-law, holding that the encroachment alleged had not been proved by the evidence. The sentence passed on the Raja was a fine of Rs. 500 or in default 20 days' simple imprisonment. Mr. H. having been invested with first class powers during the trial, the sentence became appealable to the Sessions Judge of Maimansingh, but the Raja was advised, under the peculiar circumstances of the case, to move the High Court direct to interfere on the ground that no offence had been disclosed in the case. The High Court, however, refused to interfere until the Raja had exhausted his right of appeal. The Raja was thus forced to appeal to the Sessions Judge of Maimansing and his appeal was heard on the 6th August. At the hearing of appeal the Judge handed down to the Raja's Counsel a letter which Mr. P. had addressed to him on the merits of the appeal and also a printed note which he had received from Mr. P., at the same time remarking that, in his opinion, it was improper on the part of Mr. P. to have written to him. The Judge also intimated to the Counsel that he did not wish any of the grounds of appeal reflecting upon the conduct either of Mr. P. or Mr. H. to be argued ; the argument was thus confined to the legality of the conviction only. Judgment, however, was not delivered for nearly three weeks, after which time the Judge acquitted the Raja of the offence of mischief but went out of his way to say that the offence of public nuisanse had been committed by the Raja but that he did not like to convict him on that charge, thereby giving the Raja no possible means of redress before the High Court, as that court could not be moved against a verdict acquittal. The whole of the nuisance complained of consisted of the accumulation of two feet of pure rain-water in a public drain in front of the Raja's palace, whereas the evidence showed that other municipal drains in the town had a great deal more water in them at the time. The whole correspondence between Mr. P. and the Raja's Counsel, and the orders passed by Mr. P. from time to time, clearly show that Mr. H. was from the beginning acting under Mr. P's "advice and instructions." Mr. P. boldly attempted to justify his action by reference to an old circular order of the High Court which

laid down that District Magistrates were required to "maintain a watchful and intelligent control over the proceedings of their subordinates." On a perusal of the old circular it is clear that it referred purely to executive matters such as the making and preparation of returns, etc.

After the case was over, the Raja submitted a memorial to the Lieutenant-Governor containing a summary of the facts set forth above and impugning the *bonâ fides* of Mr. P.'s proceedings on various grounds. This memorial resulted in a very feeble resolution from Sir Charles Elliott, then Lieutenant-Governor of Bengal, who, while mildly censuring Mr. P. for his indiscretion, defended his good faith and *bonâ fides.* As regards Mr. H.'s proceedings Sir Charles Elliott's resolution was absolutely silent. The attention of Parliament was drawn to the facts of this case by Lord Stanley of Alderley in the House of Lords on 8th May, 1893; during the debate which followed, the Earl of Kimberley, then Secretary of State for India, in the course of his remarks, said:—"I agree entirely with Sir Richard Garth, that it is highly undesirable that the Judicial and Executive powers should be united in one person .. .. (but) I can in no way admit that the union of those two powers is maintained in India for the purpose of enhancing the prestige of the officers of the Indian Government." Viscount Cross, Lord Kimberley's predecessor in office, also condemned the present system; he said:—"It is a matter of the greatest importance in regard to the main principle involved, that is uniting the Executive and Judicial functions. It is a matter which I was anxious to deal with myself. What the noble Earl opposite has said is perfectly true, that in the present state of the finances of India it is quite impossible to carry out this improvement which would be of vast benefit to India if it could be effected. I hope when the noble Earl has discovered some means of improving the finances of India that matter will be taken in hand. I think in this case the censure of the Lieutenant-Governor was entirely deserved, and that it is very unfortunate that magistrates should treat men as this Raja was treated, because it is absolutely essential these Rajas should know that at the hands of the English Government they will always receive justice, and that they will not be insulted."

The Government having taken no notice of Mr. P.'s conduct, the Raja was compelled to bring a civil suit, claiming heavy damages against Mr. P. for malicious prosecution ect., but was subsequently advised to withdraw the suit on Mr. P. making an apology and expressing his regret for what he had done. The suit was accordingly withdrawn.

## XX.—THE KHULNA ASSAULT CASE. (1894)

The Khulna assault case illustrates in a very remarkable manner the utter helplessness of Deputy Magistrates in Bengal, and their subserviency to District Magistrates under the present system. The Deputy Magistrates in Bengal are chiefly Bengali gentlemen who have to depend for their promotion and prospects in life upon the good-will of the District Magistrate under whom they serve. Mr. B. happened to be the District Magistrate of Khulna, and subordinate to him was Babu S. C. B., a Deputy Magistrate of several years standing. On the 19th July, 1894, one Keshub Lal Mittra, a writer in the employ of a zemindar in the interior of Khulna was informed that at about 10.30 the next morning the Magistrate and Collector of the District, Mr. B., would be passing through the village and Keshub Lal Mittra was instructed to keep ready certain provisions in the shape of fowls, eggs, and milk for the Collector, and to provide also food for his horse and groom. Keshub Lal Mittra, according to custom and without expecting any payment, procured fowls and eggs for Mr. B., and secured two milch cows, so that Mr. B. on his arrival might be supplied with fresh milk. The next morning Mr. B. arrived a couple of hours earlier than was expected, and walked up to the zemindar's house, of which Keshub Lal Mittra was in charge, looked at the poultry and eggs, and enquired where the naib or head officer of the zemindar was. Keshub Lal Mittra replied that the naib had gone to Khulna. Mr. B. then asked, 'Who are you?" Keshub replied, "I am a *mohurir* (writer)."and immediately Mr. B. struck him with a cane drawing blood. The man then asked what his offence was, whereupon he received about fourteen cuts on his person, the result of which was that he fell down in a swoon. Mr. B. walked out of the place without taking any notice of the injured man, who placed himself under the treatment of a medical practitioner, and suffered from fever as the consequence of the assault. As soon as he recovered from the fever he went straight to Khulna by boat, and on Monday, 30th July, presented a petition before the Deputy Magistrate, Babu S. C. B., who was then in magisterial charge of Khulna, charging Mr. B. with having caused hurt and with criminal trespass. The Deputy Magistrate thereupon examined the man on oath, according to law, putting a few questions to him, and made a note to the effect that the marks on the petitioner's person appeared dry. This petition was presented at noon; an hour afterwards Babu S. C. B. dismissed the complaint on two grounds—firstly, that the case was one of too trivial a nature, and

secondly, that it was upon the face of it manifestly false. At 1.15 Keshub Lal Mittra applied for copies of Deputy Magistrate's order; with what is usually called the "expedition fee," on the payment of which tbe petitioner is entitled to get the copies on the same day. Such applications for copies may be presented as a matter of right till 2 p.m. every day, but after 2 p.m., it is always discretionary with the presiding magistrate to grant such copies or not. But in this instance the application had been presented before 2 p.m., and it was not till after 2 o'clock that the applicant's agent was told that there was a technical omission in the application, inasmuch as the name of the trying officer had not been given. The officer of the Court further reported that the record of the case could not be traced, as the name of the trying officer had been omitted! A subsequent petition for copies was presented to the same Deputy Magistrate, supplying the omission at 2.45 p.m. but the Deputy Magistrate recorded an order that, as it was then after 2 45 p.m., the application could not be granted. The applicant was therefore unable to obtain copies on that day. The next day the man presented another application, with a further expedition fee at 12.26 p.m. This persistent action on the part of Keshub Lal Mittra, which must have considerably irritated the Deputy Magistrate, elicited the information that the latter had decided to prosecute the applicant for preferring a false charge against the Magistrate of the District, and therefore no copies could be given, as the matter was not then final. In consequence of this refusal on the part of the Deputy Magistrate, Keshub Lal Mittra applied on the 1st of August to the Sessions Judge of Khulna for an order that copies might be furnished to him forthwith, and this order was granted by the Judge. In the meantime Mr. B., who was then in the interior, having heard of the proceedings in the Deputy Magistrate's Court and of the intention on the part of Keshub Lal Mittra to move the Sessions Judge, wrote a private letter to the latter, of which the following is a copy:—

Bagirhat, *31st July, 1893*

My dear P.,

I am just informed that a Zemindar's *Mohurrir*, whom I struck the week before last, brought a case of assault yesterday against me before the Deputy Magistrate in charge; that the Deputy Magistrate (wrongly and foolishly) dismissed the case, and that a motion has been made before you. If this is so, please set aside the order under section 203, and order a retrial anywhere you want. I quite admit striking the man;

I was in the middle of a forty-mile ride, and had sent word a day before to the Zemindar's Cutchery (estate office) to have a glass of milk for me (which I would have paid for several times over if desired. I did actually give an old woman ten miles further on a rupee for a glass of milk). I found no milk; and being very hot and thirsty, and having a litte cane in my hand, I regret to say that I lost my temper and struck the *Mohurrir* several times. Any man might have done the same; though I freely admit I was wrong. I hear they have petitioned the L. G. If that is so, I shall tell him the real facts as soon as he comes here to-morrow. You may file this in the record.

Yours sincerely,
N. D. B. B.

The Sessions Judge having granted copies of the Deputy Magistrate's proceedings, Keshub Lal Mittra at once proceeded to Calcutta, and moved the High Court—firstly, to set aside the order of the Deputy Magistrate dismissing the complaint; secondly, to set aside the order calling upon him to show cause why he should not be prosecuted under Section 211 of the Penal Code for bringing a false charge; and, thirdly, that the petitioner's complaint should be transferred to some other district for trial, inasmuch as it was impossible for him to obtain justice in the court of any magistrate at Khulna, as all the magistrates there were subordinate to the District Magistrate, Mr. B. The High Court, consisting of the Chief Justice and Mr. Justice Beverley, issued a rule why the orders prayed for by Keshub Lal Mitra should not be made. In the meantime the Deputy Magistrate, Babu S. C. B., having heard that Keshub Lal Mitra had proceeded to Calcutta to move the High Court, and having also been informed of the contents of Mr. B.'s letter to the Sessions Judge, thought it best himself, of his own motion, to quash the order he had made calling upon Keshub Lal Mitra to show cause why he should not be prosecuted for bringing a false charge. On the hearing of the rule before the High Court, Mr. B. expressed his regret for having assaulted the complaint and apologised to him, and no cause being shown in answer to the rule, it was made absolute, and the case transferred to the Court of the District Magistrate of Alipore, one of the suburbs of Calcutta. Keshub Lal Mitra, however, after the apology tendered by Mr. B. and under the advice of his Counsel, thought fit not to press the charge against Mr. B., and the case was accordingly withdrawn. On behalf of the Deputy Magistrate, however, it was put forward, and the plea was accepted by the Lieutenant-Governor, that previously he had been suffering from a disease of the

brain, but within two months, however, Sir Charles Elliott, the then Lieutenant-Governor of Bengal, promoted him to a higher grade in the service and notified such promotion in the *Government Gazette.* Facts, however, came to light which showed that from the very beginning Sir Charles Elliott was anxious to defend both Mr. B. and Deputy Magistrate who had so misconducted himself. The latter did not hesitate to admit in a private conversation with Keshub Lal Mittra's Counsel in Calcutta, that he had been placed in a position of great difficulty, thereby implying that he had not the courage to issue a summons against his official superior, the District Magistrate. His misconduct in this matter went wholly unpunished, and the obvious result of the action of the Bengal Government was to make other Deputy Magistrates feel that if placed in similar circumstances they must not assert their independence.

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# APPENDIX B

## MR. PENNELL'S JUDGMENT ON THE CHAPRA CASE. (1899)

[A constable named Narsing Singh, then in very indifferent health, was asked by Mr. Corbett, Assistant Police Superintendent of Chapra, to do some earth-work in connection with a bundh. On his refusing to do so, Mr. Corbett beat him and kicked his bottom. Mr. Simkins, the District Engineer, who had accompanied Mr. Corbett, also gave Narsing Singh many cuts with his rattan on the bottom and the back. When the District Magistrate came to learn these facts, he caused Messrs. Corbett and Simkins to file a complaint against the constable for assault and intentional insult. Narsing Singh was accordingly put on his trial and convicted and sentenced to rigorous imprisonment for two months by a Mahomedan Deputy Magistrate, Moulvi Zakir Hossain. The Sessions Judge was moved and he called the District Magistrate, the Deputy Magistrate, the Police Superintendent and the Assistant Police Superintendent of the district as witnesses before him, released the constable, and exposed the whole conspiracy of the executive authorities of the district and the scandalous abuse of their powers. Ed.]

The appellant has been convicted by Moulvi Zakir Hussain, Deputy Magistrate of Chupra, of offences under sections 352 read with 114 and 504 of the Indian Penal Code and has been sentenced to two months' rigorous imprisonment.

The latter and more important of trials took place while I was at Motihari. Judgment was delivered on the 8th September. On the 11th September I received by post a petition of appeal with the usual copy of judgment and a letter (filed with the record) from Babu Jagannath Sahai, explaining the circumstances under which it was so sent. The petition was also accompanied by an affidavit making serious allegations against Moulvi Zakir Hussain, the trying Magistrate, and Mr. J. C. Twidell, the officiating Magistrate of the district. Babu Jagannath Sahai is a pleader of many years' standing with a considerable practice, both Civil and Criminal, and as he had taken the unusual course of swearing the affidavit himself it seemed to me to be entitled to serious notice. I therefore released the appellant on bail and sent a copy of the petition of appeal and of the affidavit accompanying it, to the District Magistrate, that he would call for Moulvi Zakir Hussain's explanation with regard to the allegations made against him by Babu Jagannath Sahai and that in transmitting it he would himself report upon these allegations so far as they affected himself.

Acting as it now appears under the orders or at all events with the approval of his executive superior, Mr. Bourdillon (the Commissioner of Patna), the District Magistrate refused to submit any explanation. I have, therefore, after duly recording my reasons, examined both Moulvi Zakir Hussain and Mr. Twidell under section 428 Cr. P. C. and under the same section have further examined Messrs. Bradley, Corbett, Simkins, and Captain Maddox. I may add that in the lower Court the appellant applied for the examination or recall of all these witnesses (with the exception of Moulvi Zakir Hussain himself and Mr. Simkins) but that his petitions were improperly rejected by the trying Magistrate.

I now come to the facts of the case. It appears that in August last the officiating District Magistrate issued orders to the Zemindars and ryots to repair certain bundhs. Although Mr. Twidell disingenuously affects ignorance upon the subject, there can be no doubt that these orders are illegal, and that a refusal to obey them is not therefore punishable. He at the same time issued orders to the police to get the people to work: as he euphemistically put it the police were to use "natural persuasion" with them.

It is admitted that the people were expected to work upon the bundh without any remuneration, the whole thing in fact was forced labor of the worst kind.

Possibly owing to some lingering doubt as to the legality of the District Magistrate's perwanas, the local police seem to have been somewhat backward in using their natural persuasion with the villagers. Accordingly, Mr. Corbett, an assistant Superintendent of Police of the age of 23, was sent out to use his natural influence, with the local police. These expressions are not mine but the District Magistrate's.

On the 19th August Mr. Corbett and Mr. Simkins, the District Engineer, who was apparently sent to render professional assistance, went to a village named Fulweria, and endeavoured to beat up recruits for the work on the bundh. Among the villagers whom they attempted to impress was Narsing Singh, the present appellant, a constable belonging to the Jalpaiguri

Police, but at the time on sick-leave. Although in Mr. Corbett's report (Ex B) written the next day, the fact of this man's being on sick-leave is (somewhat ambiguously) stated, it was not admitted by Mr. Corbett in the lower Court. In this Court, however, Mr. Corbett admits that he knew that the man was on sick-leave when he wrote Ex. B. The District Superintendent of Police, Jalpaiguri, in reply to a letter from this Court, has stated that he was granted six months' leave on medical certificate with effect from the 4th July. The evidence of the Civil Surgeon, Dr. Maddox (who is also Superintendent of the Jail) proves that the man came to the Chupra Hospital on the 20th August, the day after the occurrence, to be treated for a disease, and that when he examined the man next day in the jail he had on him sores, the result of that disease.

In the account of the occurrence which follows I am giving not the version of the accused, who brought a criminal case against Messrs. Corbett and Simkins, but the version of the latter gentlemen.

Narsing Singh, according to Mr. Corbett, seemed to be the chief spokesman of the villagers. When he endeavoured to impress them, the accused said: "why should we help, we are free men." According to Mr. Simkins, what the accused said was that he was a Chhattri and could not work: that Mr. Corbett must get low fellows to do the work. I may here remark that the accused is a Rajput, and that men of his caste do generally think themselves disgraced by doing earth-work.

Mr. Corbett then, according to Mr. Simkins, told accused to go and call low follows. According to Mr. Corbett he asked the accused "who are you": whatever Mr. Corbett said the accused stated that he was a constable. Mr. Corbett then said that was all the more reason why he should help, and repeated his orders to the accused to go and call men. The accused thereupon stated that he was not a constable of the Saran Police force but of Jalpaiguri. Mr. Corbett on this threatened to get him dismissed and, and according to Mr. Simkins, said to him, "Are you going or not going?" Thereupon accused,

according to both gentlemen, snapped his fingers in Mr. Corbett's face, and said that he did not care for his (Mr. Corbett's) orders, or more probably that he did not care that for his orders.

Mr. Corbett then seized the man by his shoulders, turned him round, kicked his bottom, and told him to go. Mr. Simkins omits the kick but Mr Corbett is explicit on the subject and there need be no hesitation in preferring his evidence as his admission goes against him even more than it does against Mr. Simkins.

The accused then retreated two or three yards and then ran at Mr. Corbett. Mr. Simkins hit him on the head with a rattan and Mr. Corbett struck him in the face with his fist, causing him to fall against a house. After he received the blow on the head from Mr. Simkins' stick, the accused, according to Mr. Corbett, called out to the villagers to use their lathies. Mr. Corbett says that he hit the accused three times in the face and that each time the man ran at him. It is not, however, asserted by either Mr. Corbett or Mr. Simkins that the accused or anyone else actually struck either of them. If the occurrence can be described as a fight it was one of those fights "*Ubi to verberas ego vapulo tantum.*"

The third time Mr. Corbett hit the man he fell on the hedge of what Mr. Corbett describes as a Makai field, but which was according to Mr. Simkins, a small patch of Makai in the village adjoining a house, not more than 4 feet square. Mr. Corbett then sat on the accused and thrashed him, and Mr. Simkins, with Mr. Corbett's help (which, I suppose, took the form of holding the man) gave him six or seven cuts with the rattan on his bottom and back.

Up to this time none of the other villagers had done anything; but while Mr. Simkins was thrashing the accused with Mr. Corbett's help, one Sital (should be Sita) Chamar came up and raised a lathi on him and asked him to let the accused go. Mr. Simkins snatched the lathi from him and hit him on the head with his rattan.

Mr. Corbett then let go hold of the accused and the latter made his escape into the thicker part of the village. Awed by the fate of their companion, the villagers set to work on the bundh. After a time a constable was sent for the accused and the latter was forced to labor on the bundh for a short time, some 5 minutes (Corbett) or 10-15 minutes (Simkins). The accused was then allowed to leave, on providing a substitute, as he alleged that he was ill. Mr. Corbett admits that he did not look well as he was well 'hammered.'

The above are the facts as stated by the prosecution. It remains to be considered whether on these facts the conviction of the accused either or both of the sections named (sections 504, 352, 114) can be sustained.

The Government Pleader who appears for the Crown has not attempted to support the conviction under section 504 I. P. Code. The Deputy Magistrate's remarks with reference to this charge is as follows :—" Of this the accused is clearly guilty—snapping of fingers in the face of Assistant District Superintendent of Police with a taunting language. "I don't care for your orders' is surely an insult sufficiently capable of provoking the Assistant District Superintendent of Police to commit a breach of the peace, and it appears as a matter of fact that the Assistant District Superintendent of Police did, upon the insult, seize the accused by his shoulders."

The Deputy Magistrate has carefully ignored the wording of S. 504 I. P. C. which runs thus :—"Whoever intentionally insults, and thereby gives provocation to any person intending or knowing it to be likely that such provocation will cause him to break the public peace"

Did the accused give provocation to Mr. Corbett intending or knowing it to be likely that such provocation would cause him to break the public peace ?

Anyone looking at the accused, at Mr. Corbett and still more at Mr. Simkins would feel that this was the very last thing accused would be likely to do. He was at the time ill, but apart from that, he is not a man of any exceptional physique. Mr.

Corbett is a sturdy young fellow, and Mr. Simkins an exceptionally powerful and well-built man in the prime of life.

No doubt the Deputy Magistrate in his judgment says—"It appears that the whole proceeding of the accused was dangerous. His words "lathi chalao" bespeak of a previous conspiracy with the villagers and his own conduct in the matter is evidence of himself being the leader."

It would be sufficient to refute these remarks if I pointed out that no one has said that any of the villagers near by had lathies, that no one at all interposed on appellant's behalf till after he had been knocked down and was being thrashed as he lay on the ground, and that the only interposition was by a single individual—a low-caste Chamar who is not asserted to have had any connection with the accused beyond their common humanity. But the Deputy Magistrate has, in his evidence, relieved me from the necessity of refuting his remarks. He admits that it was not his view of the evidence that the accused had any previous intention to molest Mr. Corbett, but that this was Mr. Twidell's view and it is clear that he inserted this passage in his judgment, not because, he believed it himself, but as he himself puts it to "satisfy the District Magistrate."

As for any provocation which the accused may have in fact given to Mr. Corbett, it is abundantly clear that Mr. Corbett brought it upon himself and in fact forced a quarrel on the appellant. Mr. Corbett thought he had a right to make the man work or at all events make him help informing others to work: and his opinion was confirmed when he found that the man was a constable. He at first ordered appellant to work on the bundh himself, and then when he found that he was a constable, ordered him to get others to work. The accused refused to obey these illegal orders: and I may add that if he had obeyed the second in the sense in which it was no doubt intended, he would himself have been committing an offence. The young Assistant Superintendent of Police was indignant at his "disobedience," threatened to get him dismissed, and asked him, no doubt in a threatening tone 'Are you going or are you not going.' It

was not till after all this that the "insult" is alleged to have been offered. The position of the prosecution appears to be this, that Mr. Corbett may do anything he likes to the native, but that the native may do nothing to him.

I regret to have to say that the Government Pleader *has* attemped to support the conviction under section 352 though he has not adduced any evidence in support of it beyond referring me to a vague expression of Mr. Corbett that the accused rendered him opposition which Mr. Corbett explains as follows: 'He rendered me opposition by *using words* that they were free men and that they were not bound to obey the District Magistrate's orders............and to Mr. Corbett's evidence later on, to the effect, that he snapped his fingers at my face and by that he wished the whole of the villagers to disrespect me.'

Mere words do not constitute an assault, still less do mere thoughts or wishes. Mr. Corbett does not himself assert that until he used criminal force to accused, he had any reason to apprehend that the accused would use criminal force to him. Mr. Corbett, on the contrary, admits that he shoved the accused and kicked his bottom, and that until he did so the accused neither himself used any violence nor called on the villagers to assist him. The accused was quite within his rights in defending himself when attacked by Mr. Corbett nor can it be alleged that if he had the right of private defence he exceeded it. Mr. Corbett admits that as a matter of fact accused did not actually strike him at all: whereas accused himself evidently received a pretty severe thrashing, to use the complainant's language, was 'well-hammered.'

For the above reasons I set aside the conviction and the sentence of two months' rigorous imprisonment passed by the Deputy Magistrate, acquit the appellant, Narsing Singh, of the offences of assault and intentional insult with intent to provoke a breach of the peace, and direct that he be discharged from the bail on which he has been enlarged.

I should not be doing my duty if I forbore to call attention to the disgraceful conduct of Moulvi Zakir Hossain,

the Deputy Magistrate, who tried this case, and of Mr. J. C. Twidell, the Offg. District Magistrate, who instituted the prosecution.

It was an observation made long ago by Thucydides, that men are more passionate for much injustice than for violence. This observation has seldom been more aptly illustrated than by this trial and the public interest which it has excited.

Assaults by Europeans upon natives are unfortunately not uncommon. They are not likely to cease until the disappearance of real or supposed racial superiority. It is proper, no doubt, that they should be punished but excessive severity in punishing them, so far from improving, is more likely to exacerbate the relations between the two races, and to defeat itself. The better men among the native community are themselves disposed to make allowances for the irritability which this climate has a tendency to produce in the European character, and the occasional acts of violence in which that irritability vents itself. The mere fact is that Messrs. Corbett and Simkins would not probably have attracted any particular attention; and although it seems to me that he had a very good ground for complaint against them, I think it on the whole improbable, if Mr. Corbett had been content after these violent proceedings to leave him alone, that the matter would ever have come into court. It was the subsequent proceedings, which occurred in their very midst,—the arrest of the appellant in the hospital at Chupra where he had gone, as the Civil Surgeon has deposed, to get treated for his disease (and possibly not without an *arriere pense* of escaping further ill-treatment, in the event of any subsequent visits of Messrs. Corbett and Simkins to his village) but as the trying Magistrate (and no doubt the District Magistrate, the District Superintendent of Police and Mr. Corbett) believed, "with the intention to obtain a certificate to make a case against the Assistant District Superintendent of Police"—the interest which the District Magistrate displayed in the prosecution,—the mock trial culminating in this monstrous sentence of two months'

rigorous imprisonment, which aroused and justly aroused the indignation of the Local Bar. Before the trying Magistrate the appellant was defended by one member only of the Chupra Bar. In this Court he has, I may say, been defended by all.

It is necessary that I should describe at some length what these subsequent proceedings were. They are set out in detail in Babu Jagannath Sahai's affidavit, with the exception of some matters which were not known to him, but have transpired during the examination of the witnesses.

The reluctance of the District Magistrate to answer those allegations, and the Commissioner's desire to hush up the case—a desire so strong that it betrayed him into the impropriety of sending me a demi-official letter (Ex. G) requesting that the witnesses should be examined *in camera*, are sufficiently explained by the evidence recorded in this Court. The explanation is that the allegations in question are true.

On the evening of the 19th instant, Mr. Corbett appears to have returned to Chupra and to have mentioned the incident of the fracas to the District Magistrate and to the District Superintendent of Police, Mr. Bradley, his Official Superior (who, I may remark, is a young man not much older than himself). From the language used by Captain Maddox to Mr. Bradley the following morning, (he referred to the accused as 'Corbett's friend') it seems probable that Captain Maddox also was present at the conversation.

Next morning the accused came to the hospital at Chupra to be treated for his disease. Captain Maddox noticed that both his eyes were blackened, and asked him how he had got them blackened. The man said that the Chota Captain Saheb had struck him—'Captain Saheb', I may remark, is the term by which in these districts a District Superintendent of Police is commonly known and 'Chota Captain Saheb' is the A.D. S.P.

From the fact that all the witnesses put all these events at 9 A.M., it would appear that immediately after this Captain Maddox drove to the Chupra Club and informed Mr. Corbett,

and from the Club proceeded to Mr. Bradley's house and informed him.

On receiving the information from Captain Maddox, Mr. Corbett sent for a ticca ghary and as soon as it arrived got into it, drove to the hospital, arrested the accused, and took him to Mr. Bradley's house. Mr. Bradley had, in the meantime, sent an inspector after the man.

On the appellant's being brought to Mr. Bradley's house Mr. Bradley who, it is hardly necessary to remark, had no authority whatever over him, impressed upon him the enormity of his conduct, that he was liable to prosecution, but said that he was not altogether inclined to prosecute him and would accept his resignation. The appellant, however, refused to resign.

Mr. Corbett says that he said all this in the lower court. I am bound to remark that if he said it, the Magistrate did not record it. On the contrary the Magistrate has recorded that Mr. Corbett has said that the accused was 'sent for' by the District Superintendent. If Mr. Corbett made this statement he was lying : it may be verbally true that the D.S.P. sent for the accused but it is evident that Mr. Corbett must have wilfully concealed the fact that he (Mr. Corbett) brought the accused, and that he was not sent for by the D.S.P. It is fair, however, to Mr. Corbett that I should state that in my court at all events the boy seemed to me to be telling the truth, and that if I had to choose between him and Moulvi Zakir Hossain's record, it would be Moulvi Zakir Hossain's record which would be more likely to go to the wall.

On the appellant's refusing to resign, Messrs. Bradley and Corbett took him to the house of the District Magistrate, Mr. Twidell. The appellant was left there in the verandah, while the two Sahebs went inside and discussed with Mr. Twidell under what sections the man was to be prosecuted.

Mr. Twidell says that so far as he remembers this was the first time he had heard of the occurrence but is clear from Mr. Corbett's evidence that Mr. Twidell's memory must have played him false. It is also clear that the whole discussion was

as to how the man was to be got at. The idea of asking the man what he had to say for himself does not seem to have occurred to Mr. Twidell.

After it had been settled under what sections the appellant should be prosecuted, Messrs. Bradley and Corbett returned to the verandah. Then Mr. Corbett drew up the report marked Ex. B. Mr. Bradley went in with this report to Mr. Twidell, first tauntingly asking the appellant if he would resign now. Mr. Twidell, at once wrote an order directing the prosecution of the appellant under sections 353 and 186 and making the base over to Moulvie Zakir Hossain for disposal.

On the 21st August Moulvi Zakir Hossain examined Mr. Corbett in chief and without permitting his cross-examination, recorded the statement of the accused. On the 22nd Mr. Simkins was examined. The accused was then called upon to defend himself under section 186 Indian Penal Code, and the case fixed for 2nd September.

After writing his orders, the Deputy Magistrate has recorded, it occurred to him, that he had better charge the accused, under section 353, Indian Penal Code also. He accordingly sent for the accused but could not find him.

Next day, however, the accused attended and was charged under 353 Indian Penal Code. Mr. Corbett was also present, and was cross-examined by Babu Jagannath Sahai, who appeared on behalf of the accused Babu Jagannath Sahai has sworn that he asked Mr. Corbett if his report would ever have seen the light of day but for the attendance of the accused at the hospital, and that Mr. Corbett answered that question in the negative. The Deputy Magistrate has sworn that he answered it in the affirmative. Mr. Corbett says that he does not remember what answer he gave in the lower court, but that he is not prepared to answer the question in the affirmative now.

Mr. Corbett admits that he was asked in the lower court from whom he got his information that accused was in hospital. He admits that he did not answer it and says that he th[illegible] the question was disallowed by the lower court

Zakir Hossain admits that the question was asked. He says that Mr. Corbett refused to answer it, and that he did not compel him to do so on the truly original ground that Police Officers are not compelled to answer! He did not, however, record that the question was put and disallowed. As I have already stated, either Mr. Corbett is mistaken or the lower court wilfully omitted to record several other important statements of his.

On the 2nd September the case for the prosecution was closed and the defence pleader declined to call any defence witnesses. The defence pleader then addressed the Court. The Magistrate then adjourned the case for reply to the 4th September. Moulvi Zakir Hossain who is a Magistrate of 27 years' standing denies knowing of the existence of any rule that the Crown has not a right of reply when the defence have called no witnesses. He admits, however, there was ample time to reply on the 2nd September. The truth, no doubt, is that he did not see how he could possibly convict on the two charges then before him; that he did not dare to acquit; and that he wanted time to find a way out of the difficulty.

On Tuesday, the 4th September, no order appears in the order-sheet. It seems, however, that on that date Mr. Bradley, the District Superintendent of Police appeared in the court, and as the Magistrate puts it "gave a reply from the ijlas" *i.e.* he was allowed a seat on the Bench, and there discussed the law and the evidence with the trying Magistrate. Mr. Bradley's explanation of his appearance is rather peculiar. It is, I understand, a rule that Police officers should conduct, or at all events look after, specially important cases such as gang dacoities and cases in which big Zemindars are involved. Mr. Bradley says "what may be called an important case under the circumstances" and that it was his duty therefore to look after it specially. From the ijlas Mr. Bradley, shortly followed by Moulvi Zakir Hossain with the record, adjourned to Mr. Twidell's private room and there discussed the case with him and with the Court Sub-Inspector.

Moulvie Zakir Hossain has admitted that he had previously discussed the case with Mr. Twidell in the train.

Moulvi Zakir Hossain first began trying cases when Mr. Twidell was a very small baby. Moulvi Zakir Hossein's explanation of his going to Mr. Twidell is amazingly frank. Whether the executive authorities at Darjeeling and Simla will be as pleased with his frankness as I am is perhaps open to question. We all know that this sort of thing goes on but it is seldom that it is brought out so clearly as in the present case. "The reason why I went to Mr. Twidell" says the Deputy Magistrate "was that in the train I asked him under what section of the law his order to repair the bundh was passed. He said that they had previous intention, it appears, to beat these men—to insult Mr. Corbett. I took the record with me to him to discuss the evidence because he said there was previous intention on the part of the accused to beat Mr. Corbett and to insult him. At the time when I took the record to Mr. Twidell that was not my opinion—it was my opinion that the questioning was begun by Mr. Corbett. I took the record with me to satisfy him that section 353 was not applicable—to explain to him. It did not strike me that it would be better to pass my judgment first and to give any explanation afterwards. I have been a Deputy Magistrate for 27 years. I have before this served under very young District Magistrates. I have discussed pending cases with them similarly. It is not the fact that I discussed the cases with them because I wanted to know what they wished me to do—it was to avoid after troubles. What I mean is that sometimes when cases are disposed of and Magistrates do not like it they find fault and so I settled it beforehand."

On the 30th September Moulvi Zakir Hossain wrote me the letter marked Ex. E. He says that his object was simply to pay his respects and that it did not occur to him that it would be better for him to do this after this case was over. It is difficult for me to resist the suspicion that Moulvi Zakir Hossain wanted to settle something beforehand with me—to

at all events, give an opportunity of letting fall a hint, should I be disposed to do so.

Even Mr. Twidell, whose conscience, from other parts of his evidence, appears elastic enough, admits that it is difficult for him to say that he did not give Moulvi Zakir Hossain any hint as to how he was to decide this case.

On the 5th September the case being then pending, on the Deputy Magistrate's showing, for judgment only, a new charge under section 504 Indian Penal Code, was framed and the accused was informed that he would also have to defend himself under section 29 of the Police Act.

On this date the defence pleader applied to cross-examine Mr. Corbett on the new charges. The order passed was that Mr. Corbett had gone to Backergunge (at the other end of Bengal) that accused must deposit his pay and travelling expenses or if he liked he could file interrogatories. The uselessness of interrogatories in a case of this kind in which Mr. Corbett was himself the complainant, is very mainfest. The amount which the appellant would have had to deposit, would probably be about equal to his pay for a couple of years.

It is admitted that on this day also Mr. Bradley sat by the Magistrate's side, that Babu Jagannath Sahai was asked by the Magistrate to discuss the law and that he declined to do so. It is also admitted that the petition to summon Mr. Bradley, Mr. Twidell and Captain Maddox as witnesses was discussed.

It is alleged on behalf of the appellant that Babu Jagannath Sahai gave as his reason for declining to discuss the law that Mr. Bradley was on the Bench and that for the same reason he protested against disclosing the reason why he wished to call Mr. Bradley and the other gentlemen named. Mr. Bradley says that he does not remember this, Molavi Zakir Hossain denies it.

It is contended by Mr. Huq for the appellant that Moulvi Zakir Hossain is lying, that he was not examined till the day after Mr. Bradley, and has only admitted such facts as are proved by the evidence of that gentleman and other European

witnesses. Attention is drawn to the petition marked as Ex. D in which it is clearly set forth that Babu Jagannath Sahai explained his reasons with protest.

Moulvi Zakir Hossain on the 7th September refused this petition as vexatious. He explains that he did not read the whole petition, but only parts of it.

*A priori*, it is very probable that Babu Jagannath Sahai would and did protest against Mr. Bradley's being on the Bench. There is, however, no statement in the affidavit that he did protest. It may, of course, be that until he knew what Mr. Bradley would say he did not venture to swear to the fact. But in the absence of any statement to that effect in his affidavit, and in the face of Moulvi Zakir Hossain's positive denial, I am unable to hold that his protesting, however probable in itself, is proved.

Whether he protested or not there cannot be two opinions that it was most improper for Moulvi Zakir Hossain to give Mr. Bradley a seat on the Bench and to allow him to argue the case from that seat. It would be improper in any case; but still more so under the peculiar circumstances of this case, in which it was inevitable that Mr. Bradley should take a lively personal interest.

The proceedings of the 5th September were followed by another adjournment with the record to Mr. Twidell's private room.

On the 7th September the case was again taken up. The Government pleader appeared on that date for the first time and was given the right of reply notwithstanding the defence pleader's protests. The case was then adjourned for judgment which was delivered the following day with the result already mentioned.

I should not omit to mention that on the 23rd August the appellant, who had only just been able to find bail, preferred a charge of voluntarily causing hurt and of unlawful compulsory labor against Messrs Corbett and Simkins. Moulvi Zakir Hossain examined the appellant at length, and he detailed the

way in which he had been arrested in Hospital and brought to Mr. Bradley's house, the pressure put upon him by Mr. Bradley, and the incidents which happened at Mr. Twidell's. Under the circumstances Moulvi Zakir Hossain's action in rejecting his petition for examining these gentlemen was a flagrant piece of servility.

The same day he convicted the appellant, Moulvi Zakir Hossain recorded the following order on his complaint. "This complaint is utterly without grounds. I have found in the counter-case that this complainant as accused in that case, was the aggressor, and that he was rightly served. I dismiss the complaint, section 203 Crimimal Procedure Code."

This order, there can be no doubt, was the end to which the present treat was the means. If there is one thing clearer than another on the face of these proceedings, it is this, that the appellant was prosecuted simply because it was feared that he would otherwise bring a case against Messrs. Corbett and Simkins. All sorts of sections were pressed into the service; but whatever Narsing's offence may have been, his crime consisted not in what he had done but in what he had suffered—it was the crime—and it may be a very grievous crime in these parts—of having been assaulted by a European official.

Neither on the evidence before Moulvi Zakir Hossain nor on that recorded by myself can I find anything which justifies the Moulvi's statement that the appellant was the aggressor and that he was rightly served—on the contrary it seems to me as at present advised that he was treated very badly. But on this point I refrain from saying more, inasmuch as in a separate proceeding I am directing a further enquiry into his complaint which Mr. Zakir Hossain has dismissed. Two other points stand out from these proceedings in equal prominence.

The first is that Mr. Zakir Hossain is a mere servile tool in the hands of his superiors, a man without conscience, with no fear of God before his eyes.

The second is that Mr. Twidell has prostituted his high

office as District Magistrate to screen his friends from justice.

With regard to Twidell. This has been contended by appellant's counsel that he has abetted an offence under section 374 Indian Penal Code. This contention seems to me somewhat extravagant. No doubt considerable moral responsibility must attach to Mr. Twidell, for there can be no doubt that he must have known perfectly well that the police would unlawfully compel men to work : but it seems to me that he has kept on the right side of the law, and that only his subordinate can be made to suffer. With regard to the actual prosecution it is clear that his object all through was not to do justice but to secure by hook or by crook that Narsing should be convicted of *something* and that any complaint which he might make should be burked.

It is all very well for Mr. Twidell to attempt to shelter himself behind Mr. Bourdillon, but it is evident that the latter's advice to submit no explanation fell upon willing ears. There was no need for Mr. Twidell to consult Mr. Bourdillon at all. He admits that he has submitted explanations to this court in other cases, and the reason why he was unwilling to do so in this case is obviously that he wished to conceal his guilt.

As to Moulvi Zakir Hossain, Mr. Huq has urged now that he has been found out, he cannot be allowed to continue any longer as a Magistrate and has asked me to report the circumstances for the information of the local government.

The creed of Moulvi Zakir Hossain, and I fear of too many other Magistrates in this country, may be appropriately summed up in the lines of James Russel Lowell :—

I du believe that I should give
    Wat's his'n unto Caesar
For it's by him I move an' live
    From him my bread and cheese are ;
I du believe that all o'me
    Doth bear his superscription,—
Will, conscience, honour, honesty,
    An' things o' that description.

It certainly does seem to me that Moulvi Zakir Hossain's predilection for satisfying his superior at all costs might find more legitimate indulgence on the revenue side. And it will be a grave scandal if he be retained as a Magistrate in this neighbourhood, I therefore direct that a copy of this judgment be forwarded through the proper channel for the Lieutenant-Governor's information.

(Sd) A. PENNELL,

*7-10-99.* *Sessions Judge.*

# APPENDIX C

*Resolutions Passed at the various Sessions of the Indian National Congress on the subject of the Separation of Judicial from the Executive Functions in the Magistrates of British India.*

**Second Congress—Calcutta—1886.**

That this Congress do place on record an expression of the universal conviction that a complete separation of executive and judicial functions (such that in no case the two functions shall be combined in the same officer) has become an urgent necessity, and that, in its opinion it behoves the Government to effect this separation without further delay, even though this should, in some Provinces, involve some extra expenditure.

**Third Congress Madras—1887.**

That this Congress once again places on record an expression of the universal conviction that a complete separation of the Executive and Judicial functions (such that in no case the two functions shall be combined in the same officer) has become an urgent necessity, and declares that, in its opinion, it behoves the Government to effect this separation without further delay, even though this should, in some Provinces, involve some extra expenditure.

**Fourth Congress-Allahabad—1888.**

That this Congress, having read and considered Resolution XI. of the Congress of 1886, to wit :—"That this Congress do place on record an expression of the universal conviction that a complete separation of the executive and judicial functions (such that in no case the two functions shall be combined in the same officer) has become an urgent necessity, and that, in its opinion, it behoves the Government to effect this separation without further delay, even though this should in some Provinces, involve some extra expenditure" and Resolution III of the Congress of 1887, to the same effect, affirm the same respectively."

**Fifth Congress—Bombay—1889.**

That this present Congress does hereby ratify and confirm the resolution passed by previous Congresses as to the urgent necessity for the complete separation of executive and judicial functions, such that, in no case, shall the two functions be combined in the same officer.

**Sixth Congress—Calcutta—1890.**

That this present Congress does hereby ratify and confirm the resolution passed by previous congresses as to the urgent necessity for the complete separation of executive and judicial functions, such that, in no case, shall the two functions be combined in the same officer.

**Seventh Congress—Nagpore—1891.**

That having regard to the unsatisfactory character, in many respects, of the Judicial and Police administration, this Congress concurs with its predecessors in strongly advocating the complete separation of Executive and Judicial functions such that in no case shall the two functions be combined in the same officer.

**Eighth Congress—Allahabad—1892.**

That this Congress, seeing the serious mischief arising to the country from the combination of Judicial and Executive functions in the same official, once again puts on record its deliberate and earnest conviction that a comple separation of these functions has become an urgent necessity and that, in its opinion, it behoves the Government to effect this separation without further delay, even though this should, in some Provinces, involve extra expenditure.

**Ninth Congress Lahore—1893.**

That this Congress having now for many successive years vainly appealed to the Government of India to remove one of the gravest stigmas on British rule in India, one fraught with incalculable oppression to all classes of the community throughout the country, now hopeless of any other redress, humbly entreats the Secretary of State for India to order the immediate appointment, in each province, of a committee (one half at least, of whose members shall be non-official natives of India qualified by education and experience in the workings of the various courts to deal with the question) to prepare each a scheme for the complete separation of all judicial and executive functions in their own province with as little additional cost to the State as may be practicable and the submission of such schemes, with the comments of the several Indian Governments thereon to himself, at some early date which he may be pleased to fix.

**Tenth Congress Madras—1894.**

That this Congress having till now vainly appealed for many successive years to the Government of India, and also to the Secretary of

State, to remove one of the gravest defects in the system of administration and one fraught with incalculable oppression to all classes of people throughout the country and having noted with satisfaction the admission of the evil by two former Secretaries of State (Lord Kimberley and Lord Cross), and being of opinion that the reform is thoroughly practicable as has been shown by Messrs. R. C. Dutt, M. M. Ghose and P. M. Mehta entreats the Government of India to direct the immediate appointment in each province of a Committee (one half at least of whose members shall be non-official Natives of India qualified by education and experience in the workings of various courts to deal with the question) to prepare a scheme for the complete separation of all Judicial and Executive functions in their own provinces with as little additional cost to the State as may be practicable and the submission of such schemes, with the opinions of the several Governments thereon at an early date.

**Eleventh Congress—Poona—1895.**

That this Congress again appeals to the Government of India and the Secretary of State to take practical steps for the purpose of carrying out the separation of Judicial from Executive functions in the adminstration of Justice.

**Twelfth Congress—Calcutta—1896.**

That this Congress notices with satisfaction the support of public opinion both in England and in India which the question of the separation of Judicial from Executive functions in the adminstration of Justice has received ; and this Congress once again appeals to the Government of India and the Secretary of State to take practical steps for speedily carrying out these much-needed reform. In this connection the Congress desires to record its deep regret at the death of Mr Mono mohun Ghosh who made this question the subject of his special study.

**Thirteenth Congress—Amrooti—1897.**

That this Congress notices with satisfaction the support of public opinion both in England and in India which the question of the separation of Judicial from Executive functions in the administration of justice has received, and this Congress once again appeals to the Government of India and the Secretary of State to take practical steps for speedily carrying out this much-needed reform.

**Fifteenth Congress—Lucknow—1899.**

That this Congress notices with satisfaction the support of public opinion, both in England and in India, which the question of the separa-

tion of the judicial from the executive functions in the adminstration of justice has received; and this Congress, while thanking Lord Hobhouse, Sir Richard Garth, Sir Richard Couch, Sir Charles Sargent, Sir William Markby, Sir John Budd Phear, Sir John Scott, Sir Roland K. Wilson, Mr. Herbert J. Reynolds and Sir W. Wedderburn for presenting a petition to the Secretary of State in Council to effect the much-needed separation, earnestly hopes the Government of India will give their earliest attention to the petition, which has been forwarded to them and will take practical steps for speedily carrying out this much-needed reform.

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# APPENDIX D

## Articles which appeared in the *Indian Daily News*

**In 1899 on**

## The Separation of the Executive and Judicial Functions in India.

### I.

It may seem a very harsh and a very unjust thing to say that the real obstacles to reform in India are the members of the Civil Service. But the saying is not without its element of truth. The Civilian's attitude towards the world in general is a perfectly intelligible one. He holds that the high function of Government is the birthright of the few. His sentiments (in fact) are those of Lord St. Aldegonde in Disraeli's novel, who, as heir to the richest Dukedom in the kingdom, was opposed to all privilege and, indeed, to all orders of men—except Dukes, who were a necessity. And what is more, he is encouraged to entertain this excellent opinion of himself and of the indispensable nature of his services, by the manner in which the man in the street so frankly regards him as a species of demigod. "They *are* our superiors, and that's the fact," exclaims the modest outsider. In the words of the author of the *Book of Snobs*, "I am not a whig myself: but oh! how I should like to be one!" This is quite in accordance with the pronouncement of Dr. Johnson that all claret would be port if it could. But there are, nevertheless, occasions on which this strange alliance of self-complacency on the one hand, and of self-abasement on the other, is apt to be productive of the most mischievous results. The tendency in official circles is to resent any proposal for reform as an attack (veiled or otherwise) upon the service, and as an attempt to encroach upon its monopoly and its perquisites. This introduction of the personal equation is natural enough: but the times of change in which we live demand higher qualities from the administrators of India. "They must learn to adapt themselves to the altered conditions of their environment, and exercise all their influence and power in bridging over the transition, so

that changes may take place with the minimum of friction and disturbance." These were the words with which a universally esteemed and respected official strove some years ago to call the attention of his brother civilians to the difficulties of the task that lay before them. Now here are they more applicable than to the proposal for the separation of the executive and the judicial functions which now lies before his Excellency the Viceroy. We hope Lord Curzon will not allow the placemen from Upper India, with whom he is surrounded at Simla, to pooh-pooh the whole affair. Such names as those of Lord Hobhouse, Sir Richard Couch, Sir Richard Garth, Sir Charles Sargent, Sir William Markby, and Sir John Scott, speak of quite as much experience and capacity as those of Mr. Rivaz, Mr. Ibbetson, Mr. Hewett, Mr. Fraser, and Mr. Holderness. There are even those who will say that they connote a great deal more of those very necessary qualifications for giving an opinion on the subject. The difficulty in the present case, however, lies not so much in the recognition of the evils of the existing system, as in the devising of an adequate and a satisfactory remedy.

Let us for a moment examine the situation in the historical aspect. Before the days of Lord Cornwallis, the Collector of a district combined in himself the civil, the criminal, and the fiscal functions. In 1793, their civil duties were taken away from them ; and in 1833, revenue work was assigned exclusively to a special staff of Deputy Collectors and Assistants. A further change was effected in 1839, when the judicial and executive functions were separated, and in 1843, Deputy Magistrates were created for the relief of the District Magistrates. But with the Sepoy Mutiny in 1857 came the re-establishment of the union of the two functions. Officials recalled the characteristic saying of Talleyrand that no one could conceive how pleasant a thing life was capable of being who had not belonged to the French aristocracy in the days before the French Revolution. The work of the past fifty years was ruthlessly undone, and the *ancien regime* was restored.

The Collector was re-invested in 1858 with magisterial powers, and the Deputy Magistrates and the Deputy Collectors were amalgamated into one service. And so the system of administration has remained to the present day. On the face of it, the combination is only defensible (if, indeed, at all) on the strongest evidence of political expediency and necessity. It is not possible for an ordinary human being—a category to which we presume District Magistrates, as well as civilians generally, may, without disrespect, be assigned—to satisfactorily or impartially fill the threefold character of Constable, Public Prosecutor and Criminal Judge. As Sir Frederick Halliday observed, with old-fashioned directness of speech, in 1838: "The union of Magistrate with Collector has been stigmatised as incompatible, but the junction of thief-catcher with judge is surely more anomalous in theory and more mischievous in practice." What, then, are the objections to the proposal that the duties of preventing crime and prosecuting offenders should be discharged by those who have no concern with judicial functions? The admirable statesman, who now fills the office of Secretary of State for India, does not afford us much assistance in our search. In reply to Mr. Pickersgill some weeks ago, he did not attempt to deny that "theoretically" there was a good deal of force in that gentleman's contentions; but, on the other hand, he was "assured by very competent civilians" that the present system did not work badly, and that the proposals put forward would entail a very heavy expenditure. We do not know who these "competent civilians" may be. Possibly they are the octogenarian members of the India Council, whose names were so reverentially placed before the House of Commons on the same occasion by Sir Henry Fowler. But we can only say that expert opinion does not support the view, nor does it find corroboration in the mass of typical cases familiar to every one who cares to study the Indian Law Reports. As for the financial difficulty, we are bound to admit that, at the first blush, it has all the appearance of substance and reality. We shall have occasion to deal more fully with this

portion of the subject in a subsequent article, and it will be sufficient to say here that the difficulty is by no means an insurmountable one. But, even if it were, are considerations of expense to deter an English statesman from overthrowing a system which violates the first principles of equity? Lastly, we are told that the combination is absolutely necessary, if the prestige of the District Officer is to be maintained. Although the doctrine was formally repudiated by Lord Kimberley during a famous debate in the House of Lords, there is no doubt that it furnishes the real and practical obstacle in the way of reform. The position is a singular one. No one who has resided in the Mofussil is ignorant of the results that so often follow from the vesting of young and inexperienced officers with the autocratic powers of the Magistrate. It may be necessary in the backward and undeveloped portions of the Indian Empire to encourage this rule of the One Man. But why perpetuate it in Bengal, in Bombay, and in Madras? As Lord Hobhouse and his fellow-memorialists very justly and temperately point out, an executive officer does not adequately discharge his duties unless his ears are open to all reports and information which he can in any degree employ for the benefit of his district. But how is the executive officer to transform himself into the judicial functionary and approach the trial of his cases under such circumstances with impartiality? Surely, he is more than prejudiced at the start by the previous knowledge of the facts which he has derived from the police enquiry he has been making into the prisoner's antecedents. It is easy to say that it is just the possession of this previous knowledge which enables the Magistrate to come to a satisfactory decision. The reply is to point to numberless cases, such as that of the late Mr. H. A. D. Phillips and the Raja of Mymensing. It is only too well-known that, (to again employ the language of the memorial) Magistrates, being keenly interested in carrying out particular measures, are apt to be brought more or less into conflict with individuals, and do not hesitate to cut down the tall poppies that are so unmannerly as to bear their progress.

In Mr. Phillips' case, that Magistrate did not himself try the Raja, but he openly declared that the Assistant, by whom the case was heard, and who was directly under his orders, was a mere conduit-pipe leading from the fountain of justice. Another, and a most forcible, argument advanced by the Memorialists will appeal very strongly to the Magistrates themselves. The enormous amount of miscellaneous business for which they are responsible renders it quite impossible for them to find sufficient time for the proper discharge of their criminal work, both original and appellate. The extended tours of the Magistrate and Collector throughout his district during the cold weather expose the suitors before him to incredible inconvenience and harassment. There is a famous case on record of a Magistrate who took a dislike to a prominent personage within his jurisdiction. The unfortunate man was made to follow the camp of the official in question from place to place, with a regular *posse* of pleaders and witnesses, in order to answer a charge preferred against him. At each halting-place he was informed that his case would be taken up at the next: and so the farce proceeded, until the aid of High Court was invoked to put an end to this unedifying exhibition. Such then are some of the evils—and the admitted evils—of the present system of "combining the thief-catcher and the judge." Can it be that the maintenance of the prestige of our administrators is bound up with such melancholy travesties of equity and justice? It does not speak much for our century of rule in India if the answer is to be in the affirmative. In our next article we shall endeavour to show in what directions reform is not only feasible, but possible, without any appreciable increase of expenditure. With a Viceroy at the head of affairs of less self reliance and power of initiative, we should have hesitated to approach the subject, notwithstanding its vital importance to the well-being of the country. It is a hopeless task to seek to convince one who is content to regard the Anglo-Indian official as the one and only repository of information with regard to Indian affairs. But the Empire is nowadays in the hands of a

ruler of a different stamp, and public criticism, instead of being checked or contemptuously brushed aside, is astonished to find itself encouraged and considered on its merits.

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II.

We trust it is not too much to hope that the note of warning struck by us, in the opening portion of our previous article, has not been sounded in vain. Nothing could be more unfortunate than the intrusion of the personal equation into His Excellency's counsels, when so important a question is under discussion. As far as we are concerned, we freely and ungrudgingly admit the greatness of the obligations under which the members of the Civil Service have placed the Empire. In their ranks, there have always been men to whom the noble satisfaction of governing has been the sole attraction. But the forte of the civilian has invariably been in the direction of administration. He has not proved a success as a lawyer or as a judge, in spite of such brilliant exceptions as Sir John Jardine and Sir Raymond West. It would be a marvel indeed if he had. His whole training unfits him for the discharge of judicial duties. Infinite patience and discrimination, respect for the forms of the law, scrupulous attention to the demands of justice, rigid imperviousness to rumour and to outside reports—these are some of the qualities which experience and the needs of mankind have declared to be essential attributes of the judicial office. Is there any stage in the career of a civilian in which he is afforded the opportunity for their acquisition? We reply by putting another question: What is meant by the phrase "an executive judge" which we hear applied to some members of the Mofussil judiciary? If the truth must be told, it is employed to designate an officer whose zeal in convicting offenders is only outrun by his conscientious belief that the interests of good government are best promoted by never giving a prisoner the benefit of the doubt. Nor can we affect surprise at encountering snch judges when we find young civilians taken straight from the Financial Department and the Settlement Officer's camp and placed upon the Bench. But there are even

stranger discoveries in store for the investigator. It is not so long ago that the *Pioneer* was gravely discussing the question whether Mr. H. F. Evans, then district Judge of Allahabad, should act for Mr. La Touche as Chief Secretary or Mr. Justice Burkitt in the High Court. He was appointed to the executive post and now adorns the Board of Revenue. We can remember yet another occasion when Sir Antony MacDonnell chose his Chief Secretary from the ranks of the District Judges. And so the game goes on. Meanwhile it cannot be too strongly insisted upon that the executive spirit is, and always has been, and must necessarily be, altogether distinct from the judicial. We take it, therefore, that the one essential condition of reform must be the entire separation of the two branches of the Service. The judiciary must be subordinate to the highest judicial authority, in every sense of the word, and there must be no stepping across from one side of the road to the other—in plainer words, there must be no promotion from executive to judicial posts, or *vice versa*. At the head of the executive branch, must, of course, be (as he now is) the Lieutenant-Governor with his Secretaries. Next in order, and concerned with revenue matters, will still come the Board of Revenue, which we would reinforce by two more members, bringing the total to four. The duty of the two new members should be of a peripatetic character. It will be for them to perform the work now discharged by the Commissioners of Divisions. These latter functionaries would be abolished, and we venture to think that the despatch of public business will be greatly facilitated by their disappearance. The double contrivance of a Board of Revenue and of Commissioners is not tolerated in Madras or in Bombay, and, while it may be required in the North-Western Provinces for settlement purposes, it is nothing but a useless luxury and a clog in Bengal. Below the Board of Revenue, we would place in every district a Collector. Under him, again, will be the regular staff of Sub-Collectors, Assistant Collectors, and Deputy and Sub-Deputy Collectors as at present. But the duties of one and all will be purely concerned with the

executive and revenue branches of the administration. The removal of his present Magisterial duties from the District Officer will still leave him more than enough to do in the way of work. He will continue to be a veritable Lord High Everything Else, for he will combine in himself the functions of head of the police, head superintendent of prisons, head revenue officer, head tax-collector, head of the Government treasury, head manager of Government estates and of properties under the Court of Wards, head engineer, head sanitary officer and head superintendent of primary schools. And what more can any mortal man require, who thirsts for power? It is absurd to declare that his prestige will be gone, if he is no longer head magistrate in addition. Prestige may have been a potent factor in the situation a quarter of a century ago, when Sir James Westland ruled over Khulna. But it is the Sick Man of the India of to-day. How many civilians in Bengal are there, who govern their districts by virtue of prestige in these days of questions in Council and articles in the Press, and constant supervision and interference from above? It is hightime to look at these matters from the standpoint of the present and to cease to accept as gospel the opinions of antiquated critics, whose knowledge of the Mofussil ends with the sixties or the seventies. So much for the executive branch. On the judicial side, the official hierarchy will be identical—High Court, District and Sessions Judges, Magistrates, Assistant Magistrates, and Deputy and Sub-Deputy Magistrates. To preside over the Civil Courts, there will be, as now, Subordinate Judges and Munsifs. Turning to details, we have first to advocate the strengthening of the High Court by the appointment of two additional Judges and the introduction of the Circuit system. There can be no doubt that the present District and Sessions Judges do not shine when they sit as original criminal courts. The amount of time now wasted over sessions cases in the Mofussil almost passes belief. A couple of competent High Court Judges, by going regularly on circuit through the province, would get through the work not only

more expeditiously but more satisfactorily. We mean no disrespect to our Mofussil judiciary, who are as honest and upright a body as any in the world. But the defects, from which they are unhappily not free, are due to no fault of their own, for they are inherent in the system. They cannot be compensated for by honesty and integrity. For these are qualities which would fit any merchant or journalist for the Judicial Bench. A man cannot make a good judge, unless he has first had the advantage of proper grounding in legal matters, and has enjoyed some practical experience in the working of the law. We hope some attempt will be made to improve the status and the position of the Mofussil judiciary in these respects. Our scheme is, in this direction, confessedly incomplete, but it is useless to agitate for lawyer judges, when we have the Civil Service arrayed against us in a solid phalanx, and prepared to resist to the last any attempt to deprive them of the appointments they now hold. The reform, of course, is bound to come, sooner or later. But it will have to be forced upon the Civil Service from without. The Civil Service will continue to exist, but it will discharge its legitimate functions and leave to trained lawyers the administration, as well as the practice, of the law. Meanwhile, it is perfectly easy to put into operation, in the permanently-settled portions of Bengal at least, the scheme we have unfolded. There will be no financial loss to be encountered, for the abolition of eight Commissionerships will effect a monthly saving of a quarter-of-a-lakh of rupees. Nor is there any difficulty with regard to the increase that may be anticipated in the staff of the administration. Thanks to Sir James Westland and his generous ideas on the recruitment of the Service, the Province is annually enriched with twenty young civilians: and the Government of Bengal is obviously at its wit's end to provide for them. Already new appointments, such as that of Personal Assistant to the Chairman of the Corporation, are being invented in order to relieve the pressure. In a few years we shall find these young civilians not

only monopolizing every sub-division in Bengal, but acting, in all manner of unfamiliar capacities, as Inspectors of Schools or of Registration, and as Superintendents of Police, and in fact, filling any post which will furnish them with occupation of some kind. History, it is true, will be only repeating itself: but there is yet time to prevent such an absurdity. Let every newly-joined Bengal civilian be drafted, on arrival, into one or the other branch of the Service. And, when once gazetted as an Assistant Magistrate or as an Assistant Collector, let it be definitely understood that he remains an executive, or a judicial officer, as the case may be, until he retires. At present, the civilian in high place is exactly like Horace's talkative god: *Olim truncus ficulnus, inutile lignum, cum faber incertus, scamnum faceretne Priapum, maluit esse deum: deus inde ego.* He has even improved upon Horace. The god to-morrow may be a garden-bench, for aught he knows. We laugh at the Chinese Mandarin, who thinks himself competent for any post, ofrm the office of Commander-in-Chief to that of Legal Remembrancer. But why do we not look nearer home and pluck out the mote that lies festering in our own eye? What would be said in England if a Treasury Clerk were habitually made a Country Court Judge, or a Police Magistrate ordinarily promoted to the permanent Under-Secretaryship at the War Office? We do not expect His Excellency the Viceroy to work miracles: but we do appeal to him to make a beginning in the right direction. The conditions are, without exception, favourable, and the reforms we have sketched can be undertaken in Bengal, without a rupee of additional expenditure, or the loss of an atom of that prestige which seems to be regarded as so precious a possession.

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## III.

In our last article on the subject we ventured, as our readers will remember, to sketch the outlines of a scheme for the complete separation of the executive and judicial functions. It was one of the features of that scheme that the

present Commissionerships of Divisions should be abolished. There can be no doubt, we fear, that the interposition of this buffer between the Board of Revenue and the District authorities is productive of much confusion and delay. But, on the other hand, as a Civilian once genially remarked of the members of the legal profession, even the meanest creatures are not without their uses. It is equally clear that the Board of Revenue finds itself seriously hampered, under existing conditions, with district returns. To do away with the Commissionerships, would, of course, merely aggravate the evil. The tendency of the day already lies far too strongly in the direction of centralization, and, in the opinion of many, far too much time is devoted at head-quarters to the consideration of details. We must not forget, moreover, in this connection, the youth and inexperience of the modern Collector. So long as the Government chooses to appoint junior Civilians of three or four years' service to the charge of important districts, so long must it avail itself of the services of a local controlling and supervising authority in the person of the Divisional Commissioner. Speaking for ourselves, we should be glad, as we have previously said, to witness the disappearance of this particular official in Bengal. But with a Government constituted such as ours, it is no light matter to advocate the absorption of eight snug official billets, carrying with them an aggregare monthly salary of over three thousand rupees. Fortunately, however, a saving can easily be effected in another direction; and as the interests of the Covenanted Service will not suffer by the adoption of the reform, the members of the Covenanted Service, who are responsible for our Government, may probably be induced to regard it with greater favour. If the executive and the judicial functions are finally and actually separated, we see no reason why the whole of what are now called "superior police appointments" should not be abolished. The executive officer in charge of each district will retain the headship of the police, among his many bewildering functions, and, in our opinion, he should be

the actual chief of the force. We would have him take the place of the present District Superintendent of Police, in addition to his other executive and fiscal duties. The arrangement has this much to recommend it, that it affords complete answer to those who argue that influence and prestige would be lost by the taking away of judicial powers from the executive head of the district. As the chief of police, he will always have a rod in pickle for the refractory zemindar or the troublesome villager. The official, in any case, is no longer surrounded with that halo which encircled him in the days of John Company. Things have changed with him as they have with all of us. There is about as much of their glory left to them as their is of their secular magnificence left to the great prelates of King George's time. We have no longer to approach the Archbishop of Canterbury on gilt-edged paper, nor does the Bishop appear in his Cathedral city in a coach-and-six. The modern Civilian will be wise if he ceases to hanker after the fleshpots of the past. He will find far more profitable employment in keeping himself and his district out of the columns of the native press. Outwardly, the attitude of Government towards the native press is the one recommended by Sir Charles Elliott. That eminent personage's advice was as candid as it was entertaining. "If you find that to read criticisms in newspapers causes excessive irritation," said Sir Charles on a public occasion to his fellow-Civilians, "your best course is to leave them unread ; cultivate the grand disdain shown in the advice which Virgil gave to Dante." This is, no doubt, excellent advice, and quite on the principle of the ostrich who buries his head in the sand to avoid observation. But it happens that the Government, as a matter of fact, adopt the opposite policy. Whether this is right or wrong, we do not pretend to discuss. But, while it is so, it is a little difficult to see where the maintenance of the prestige of the district officer comes in. There was a time, we admit when, if a Magistrate flogged a *mukhtear*, nothing more was heard of it : for every one considered such amusements to be part of the *hakim's*

prerogative. But it is as useless to sigh for the return of such "good old days," as it is to look for a specimen of the dodo; and the Civilian of to-day must be content with the powers which the control of the police, the revenue, and the executive gave him, without hankering after the right to judicially try and punish the criminals he himself places in the dock. Such men as Lord Hobhouse and Sir Richard Couch are not revolutionaries, nor do they demand the application of a hard-and-fast rule to the whole of India. It may not be expedient to separate the executive and judicial functions in the Punjab, or in Assam or Burmah. But Bengal, Madras and Bombay stand on a very different footing. Is it seriously contended that the safety of the Empire would be imperilled if the Collector were deprived of his Magisterial functions in these tranquil and settled regions? The pity of it is that the Simla officials will not listen to argument. "The best thing you can do," they inform the public from their "workshop" in the hills, "is not to ask questions at all, but to trust us implicitly and rely on our superior wisdom. We are wiser than you are. A kind Providence has ordained that we should govern you, and has endowed us with universal knowledge. Other people change their opinions: we never do. We have known and done, know and do, will know and do, everything." This is, of course, a very comforting doctrine for the Simla official, but it is very far from satisfying the Englishman who has interests in the Mofussil, and who is brought quite as much, and even more, in contact with the natives than Members of Council and Secretaries of Government. The non-officials' experience of the evils arising from the combination of the executive and judicial functions would fill many a volume, and we shall be more than surprised if they bear out the encomiums of Lord George Hamilton and his official friends. But the Greek Kalends must first arrive before they will be invited to furnish them, and before the official version will cease to be regarded as the one and only gospel of the faith. But we would ask Lord Curzon and his non-official colleagues, Mr.

Raleigh and Mr. Dawkins, to look at this matter from the point of view of the ruled and not to the ruler. They have no official preserve to defend. In fact, they are themselves intruders into the Civilian nest. A perfectly feasible and rational scheme is before them. Will they not allow a trial to be given to it,—if not in the Lower Provinces, at any rate in the Presidency and Burdwan Divisions ?

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